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LEE v. WEISMAN: WHITHER THE ESTABLISHMENT CLAUSE AND THE LEMON v. KURTZMAN THREE-PRONGED TEST?

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LEE v. WEISMAN: WHITHER THE ESTABLISHMENT CLAUSE AND THE *LEMON v. KURTZMAN* THREE-PRONGED TEST?

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TABLE OF CONTENTS

I. *LEE v. WEISMAN* 408
A. The Lower Court Opinions 408
B. The Supreme Court Case 412
C. Justice Kennedy's Opinion for the Court 416
D. The Concurring Opinions 422
E. Justice Scalia's Dissent 426
II. ANALYSIS AND DISCUSSION 430
A. The Supreme Court in Flux 430
B. Justice Kennedy's Tortured Opinion 434
C. Did the Court Ignore Standing Requirements in *Lee v. Weisman*? 439
D. Has the Supreme Court Totally Outlawed Prayers at Public School Graduations? 443

INTRODUCTION

Lee v. Weisman,[1] the United States Supreme Court's latest Establishment Clause[2] decision, presents something of a puzzle.

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1. 112 S. Ct. 2649 (1992), *aff'g* 908 F.2d 1090 (1st Cir. 1990), *aff'g* 728 F. Supp. 68 (D.R.I. 1990). See Thomas A. Schweitzer, Lee v. Weisman *and the Establishment Clause: Are Invocations and Benedictions at Public School Graduations Constitutionally Unspeakable?*, 69 U. DET. MERCY L. REV. 113 (1992) for an in-depth discussion and analysis of the lower courts' decisions in *Weisman* and other graduation prayer cases.

2. U.S. CONST. amend. I, cl. 1. The Establishment Clause provides: "Congress shall make no law respecting an establishment of religion . . . ." *Id.*

The issue in *Weisman* was whether a clergyman's prayers at a public school graduation violated the Establishment Clause.[3] The Court held by a 5-4 vote that they did, and it declined the Solicitor General's invitation to revise or discard the three-pronged test of *Lemon v. Kurtzman.*[4] Thus, strict church-state separationists hailed the decision as a pleasant surprise,[5] in light of the fact that a contrary result had been widely anticipated.[6] The majority decision was written by Justice Anthony Kennedy, who had been regarded as a member of the opposing faction on the Court.[7]

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3. The Supreme Court held that classroom prayers violated the Establishment Clause in Engel v. Vitale, 370 U.S. 421 (1962) and Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

4. 403 U.S. 602 (1971). According to the requirements of the *Lemon* test, to survive a challenge to its constitutionality under the Establishment Clause, "[f]irst, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . [and] finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). Since *Lemon v. Kurtzman* was decided, its three-pronged test has been the governing standard for determining whether challenged statutes violate the Establishment Clause. *See* Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987); *see also infra* note 9.

5. *See 1992: Justices' Inconclusive Ruling Intensifies Church-State Debate*, SCH. L. NEWS, Jan. 1, 1993, at 7 ("On the day *Lee* was issued, groups such as Americans United for Separation of Church and State, the Anti-Defamation League and People for the American Way sent out statements proclaiming a 'major victory' for church-state separationists.").

6. *See* David S. Tatel, Elizabeth B. Heffernan, Maree F. Sneed, and Daniel B. Kohrman, *Commentary - The 1991-92 Term of the United States Supreme Court and its Impact on Public Schools*, 78 EDUC. L. REP. 3, 10-11 (Dec. 1992); *see also* Martha M. McCarthy, *Is the Wall of Separation Still Standing?*, 77 EDUC. L. REP. 1, 9 (Nov. 1992); David Schimmel, *Graduation Prayers Flunk Coercion Test: An Analysis of* Lee v. Weisman, 76 EDUC. L. REP. 913, 913 (Nov. 1992); Linda Greenhouse, *Slim Margin - Moderates on Court Defy Predictions*, N.Y. TIMES, July 5, 1992, § 4, at 1, 12.

7. Justice Kennedy's opinion in County of Allegheny v. ACLU, 492 U.S. 573 (1989), criticized the *Lemon* test and maintained that coercion was necessary for a violation of the Establishment Clause. *Id.* at 659-63 (Kennedy, J., concurring in part and dissenting in part). Justices Blackmun, *id.* at 602-13, O'Connor, *id.* at 627-28 (O'Connor, J., concurring in part and concurring in the judgment), and Stevens criticized this view. *Id.* at 650 n.6 (Stevens, J., concurring in part and dissenting in the judgment). In *Weisman*, ironically,

Contrary to Supreme Court precedent,[8] Justice Kennedy steadfastly maintained that coercion was required for an Establishment Clause violation, and he refrained from analyzing the case under the *Lemon* test.[9] This significant omission appears to presage the demise of the *Lemon* test, which various commentators have predicted,[10] and it led Professor Jesse Choper to conclude that

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Justices Blackmun, O'Connor and Stevens concurred in Justice Kennedy's opinion, which was excoriated by Kennedy's erstwhile ally in *County of Allegheny v. ACLU*, Justice Scalia.

8. *See infra* note 103.

9. Thus, *Weisman* became only the second of 32 Establishment Clause cases since *Lemon* which did not apply the *Lemon* three-pronged test. The other case was Marsh v. Chambers, 463 U.S. 783 (1983), in which the Court upheld the constitutionality of the Nebraska State Legislature's chaplain. *See Weisman*, 112 S. Ct. at 2663 n.4 (Blackmun, J., concurring).

10. Professor Ira Lupu, who witnessed the November 6, 1991 Supreme Court argument in *Lee v. Weisman*, noted that neither counsel nor the Justices mentioned *Lemon v. Kurtzman* for the first 55 minutes of the argument. Ira Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 749 n.24 (1992). He concluded that "[t]he twenty-year reign of the Establishment Clause test of *Lemon v. Kurtzman*, with its focus on secularity of purpose, secularity of consequences, and state-religion interaction, is about to end." *Id.* at 762.

Professor Michael W. McConnell stated: "But it is increasingly evident that the *Lemon* test is largely irrelevant or indeterminate when applied to most serious establishment issues. A new, much less ambiguous, test has effectively replaced *Lemon*, though the Court has continued to be coy about the change of doctrine." Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992). *See also Constitutional Law Conference*, 61 U.S.L.W. 2237, 2240 (Oct. 27, 1992) (Professor Jesse H. Choper discussing public prayer).

No fewer than five current Supreme Court Justices have criticized the *Lemon* test, at least in part. *See Schweitzer, supra* note 1, at 115 n.6 (citing Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at 9, Lee v. Weisman, 908 F.2d 1090 (1st Cir. 1990), *aff'd*, 112 S. Ct. 2649 (1992) (quoting Justices Kennedy, Scalia, O'Connor, and White, and Chief Justice Rehnquist)). Justice Stevens has also been a critic of the *Lemon* test, albeit from a different extreme than Justice White and Chief Justice Rehnquist. *See* Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) where Justice Stevens echoed his views expressed in Wolman v. Walter, 433 U.S. 229, 264 (1977) (Stevens, J., concurring in part and dissenting in part), and Roemer v. Board of Pub. Works of Md., 426 U.S. 736, 775 (1976) (Stevens, J., dissenting), that:

the liberal separationists had won the battle but lost the war.[11] While the result in *Weisman* is harmonious with longstanding Establishment Clause precedents, the case may represent a transitional step towards a more accommodationist doctrinal future.[12]

Prayers at public school graduations are a longstanding American tradition,[13] but *Weisman* represented the first time that the

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> [T]he entire enterprise of trying to justify various types of subsidies to nonpublic schools should be abandoned. Rather than continuing with the sisyphean task of trying to patch together the "blurred, indistinct, and variable barrier" described in Lemon v. Kurtzman, 403 U.S. 602, 614, I would resurrect the "high and impregnable" wall between church and State constructed by the Framers of the First Amendment.

Id.

One would also expect Justice Thomas to oppose the *Lemon* test given his closeness to Justice Scalia on most issues and his concurrence in Justice Scalia's dissent in *Lee v. Weisman*. Justices Thomas and Scalia had the highest rate of agreement of any pair of Justices during the 1991-92 Term in cases where the Court failed to reach a unanimous decision, voting together 81% of the time. Linda Greenhouse, *supra* note 6, at 1.

11. *Constitutional Law Conference*, 61 U.S.L.W. at 2240.

12. One of the principal areas of Establishment Clause controversy in recent years has centered on the question of whether it is permissible for the government to take steps to "accommodate" the requirements and practices of individual religions even if such accommodation does not alleviate a burden on the free exercise of religion. *See generally* Michael W. McConnell, *supra* note 10; Ira C. Lupu, *supra* note 10. In *County of Allegheny v. ACLU*, Justices Blackmun and O'Connor maintained that the challenged creche could not be justified as an accommodation of religion since it removed no burden on the free exercise rights of those who supported it: they were free to display such creches in their homes and churches. 492 U.S. 573, 601 n.51 (1989); *id.* at 631-32 (O'Connor, J., concurring in part and concurring in the judgment). Justice Kennedy rejected this view. *Id.* at 663 n.2 (Kennedy, J., concurring in the judgment in part and dissenting in part). Justice Souter adopted the Blackmun-O'Connor view in *Lee v. Weisman* when he stated that "accommodation must lift a discernible burden on the free exercise of religion" in order to be permissible. 112 S. Ct. at 2677 (Souter, J., concurring).

13. Justice Scalia's dissent in *Lee v. Weisman* noted that what was perhaps the first instance of prayer at a public high school graduation ceremony occurred at the Norwich, Connecticut Free Academy in July 1868. 112 S. Ct. at 2680-81 (Scalia, J., dissenting).

Supreme Court had considered their constitutionality.[14] Three cases decided in the wake of the school prayer cases[15] all held the practice constitutional.[16] The issue was evidently regarded as settled until a new series of cases was decided, beginning in 1985, most of which held the practice unconstitutional.[17] The

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14. A similar issue was raised peripherally in Chamberlin v. Dade County Bd. of Pub. Instruction, 377 U.S. 402 (1964). Justice Douglas, concurring in part in the Court's reversal of the Florida Supreme Court's decision upholding school prayer, *see* Chamberlin v. Dade County Bd. of Pub. Instruction, 160 So.2d 97 (Fla. 1964), stated that the challenged baccalaureate services in the public schools did not present a substantial federal question. 377 U.S. at 403 (Douglas, J., concurring). Justice Black joined in Justice Douglas' opinion. *Id.* at 402. It is rather striking that the two staunch separationists saw no First Amendment problem at the time in a religious program as part of a public school graduation.

15. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

16. Grossberg v. Deusebio, 380 F. Supp. 285 (E.D. Va. 1974); Wood v. Mt. Lebanon Township Sch. Dist., 342 F. Supp. 1293 (W.D. Pa. 1972); Wiest v. Mt. Lebanon Sch. Dist., 320 A.2d 362 (Pa. 1974), *cert. denied*, 419 U.S. 967 (1977). For a description of these cases, see *Schweitzer*, *supra* n.1, at 123-26.

17. For cases which held the practice unconstitutional see Stein v. Plainwell Community Sch., 822 F.2d 1406, 1409 (6th Cir. 1987), *rev'g* 610 F. Supp. 43 (W.D. Mich. 1985) (but court stated it would uphold invocations and benedictions that "preserve[] the substance of the principle of equal liberty of conscience" pursuant to *Marsh v. Chambers*); Lundberg v. West Monona Community Sch. Dist., 731 F. Supp. 331 (N.D. Iowa 1989); Graham v. Central Community Sch. Dist. of Decatur, 608 F. Supp. 531 (S.D. Iowa 1985); Sands v. Morongo Unified Sch. Dist., 809 P.2d 809 (Cal. 1991), *rev'g* 262 Cal. Rptr. 452 (Cal. Ct. App. 1989), *cert. denied*, 112 S. Ct. 3026 (1992); Bennett v. Livermore Unified Sch. Dist., 238 Cal. Rptr. 819 (Cal. Ct. App. 1987); Kay v. David Douglas Sch. Dist. No. 40, 719 P.2d 875 (Or. Ct. App. 1986), *rev'd on other grounds*, 738 P.2d 1389 (Or. 1987), *cert. denied*, 484 U.S. 1032 (1988). *See also* Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989) (struck down practice of giving invocations before public high school football games); Steele v. Van Buren Pub. Sch. Dist., 845 F.2d 1492 (8th Cir. 1988) (enjoined prayer sessions conducted by band teacher prior to mandatory rehearsals and performances).

For cases which upheld the practice of conducting non-sectarian, nonproselytizing prayers see Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991), *cert. granted and judgment vacated*, 112 S. Ct. 3020

circumstances varied in these cases. In some instances, school authorities planned the prayers,[18] and in others they acceded to requests by the graduating seniors for such prayers.[19] Graduation prayers were variously delivered by clergymen,[20] students,[21] and teachers.[22] The texts of the prayers were usually not reviewed by

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(1992) (remanded for reconsideration in light of *Lee v. Weisman), aff'd on remand*, 977 F.2d 963 (5th Cir. 1992); Griffith v. Teran, 794 F. Supp. 1054 (D. Kan. 1992); Albright v. Board of Educ. of Granite Sch. Dist., 765 F. Supp. 682 (D. Utah 1991). *See also* Berlin v. Okaloosa County Sch. Dist., No. PCA 87-30450-RV, 1988 WL 85937 (N.D. Fla. Mar. 1, 1988) (denied preliminary injunction sought to enjoin practice of offering prayers before high school football games).

18. *See* Griffith v. Teran, 794 F. Supp. 1054 (D. Kan. 1992); Graham v. Central Community Sch. Dist. of Decatur, 608 F. Supp. 531 (S.D. Iowa 1985); Sands v. Morongo Unified Sch. Dist., 809 P.2d 809 (Cal. 1991), *rev'g* 262 Cal. Rptr. 452 (Cal. Ct. App. 1989), *cert. denied*, 112 S. Ct. 3026 (1992); Bennett v. Livermore Unified Sch. Dist., 238 Cal. Rptr. 819 (Cal. Ct. App. 1987); Kay v. David Douglas Sch. Dist. No. 40, 719 P.2d 875 (Or. Ct. App. 1986), *rev'd on other grounds*, 738 P.2d 1389 (Or. 1987), *cert. denied*, 484 U.S. 1032 (1988).

19. *See* Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991), *cert. granted and judgment vacated*, 112 S. Ct. 3020 (1992) (remanded for reconsideration in light of *Lee v. Weisman), aff'd on remand*, 977 F.2d 963 (5th Cir. 1992); Stein v. Plainwell Community Sch., 822 F.2d 1406 (6th Cir. 1987), *rev'g* 610 F. Supp. 43 (W.D. Mich. 1985); Albright v. Board of Educ. of Granite Sch. Dist., 765 F. Supp. 682 (D. Utah 1991).

20. *See* Graham v. Central Community Sch. Dist. of Decatur, 608 F. Supp. 531 (S.D. Iowa 1985); Sands v. Morongo Unified Sch. Dist., 809 P.2d 809 (Cal. 1991), *rev'g* 262 Cal. Rptr. 452 (Cal. Ct. App. 1989), *cert. denied*, 112 S. Ct. 3026 (1992); Bennett v. Livermore Unified Sch. Dist., 238 Cal. Rptr. 819 (Cal. Ct. App. 1987); Kay v. David Douglas Sch. Dist. No. 40, 719 P.2d 875 (Or. Ct. App. 1986), *rev'd on other grounds*, 738 P.2d 1389 (Or. 1987), *cert. denied*, 484 U.S. 1032 (1988).

21. *See* Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991), *cert. granted and judgment vacated*, 112 S. Ct. 3020 (1992) (remanded for reconsideration in light of *Lee v. Weisman), aff'd on remand*, 977 F.2d 963 (5th Cir. 1992); Stein v. Plainwell Community Sch., 822 F.2d 1406 (6th Cir. 1987), *rev'g* 610 F. Supp. 43 (W.D. Mich. 1985); Griffith v. Teran, 794 F. Supp. 1054 (D. Kan. 1992); Albright v. Board of Educ. of Granite Sch. Dist., 765 F. Supp. 682 (D. Utah 1991); Bennett v. Livermore Unified Sch. Dist., 238 Cal. Rptr. 819 (Cal. Ct. App. 1987).

22. *See* Sands v. Morongo Unified Sch. Dist., 809 P.2d 809 (Cal. 1991), *rev'g* 262 Cal. Rptr. 452 (Cal. Ct. App. 1989), *cert. denied*, 112 S. Ct. 3026

the school authorities before they were delivered, although some school authorities specified non-denominational prayers.[23] In some, but not all instances, those in attendance were asked to join in the prayers.[24] Some of these factors may be constitutionally significant, as the Fifth Circuit concluded when it again upheld the constitutionality of graduation prayers in a case which the Supreme Court had vacated and remanded for reconsideration in light of the *Weisman* decision.[25]

(1992); Kay v. David Douglas Sch. Dist. No. 40, 719 P.2d 875 (Or. Ct. App. 1986), *rev'd on other grounds*, 738 P.2d 1389 (Or. 1987), *cert. denied*, 484 U.S. 1032 (1988).

23. *See* Lee v. Weisman, 112 S. Ct. 2469 (1992); Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991), *cert. granted and judgment vacated*, 112 S. Ct. 3020 (1992) (remanded for reconsideration in light of *Lee v. Weisman)*, *aff'd on remand*, 977 F.2d 963 (5th Cir. 1992); Griffith v. Teran, 794 F. Supp. 1054 (D. Kan. 1992); Albright v. Board of Educ. of Granite Sch. Dist., 765 F. Supp. 682 (D. Utah 1991).

24. Attending persons were asked to join in prayer in Jager v. Douglas County Sch. Dist., 862 F.2d 824, 826 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989) (pre-game invocations began with words "let us bow our heads" or "let us pray"); Graham v. Central Community Sch. Dist. of Decatur, 608 F. Supp. at 533 (minister intended to state before invocation, "[w]ill those who wish to pray with me join me"); Sands v. Morongo Unified Sch. Dist., 809 P.2d at 864-65 (appendix to the opinion) (minister who delivered invocation at Yucca Valley High School's 1986 graduation stated "[s]o if you would like to you can bow yours head, if not, feel free not to, that is what freedom is all about," while teacher who delivered benediction began by stating "please stand and join us in prayer").

25. Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991), *cert. granted and judgment vacated*, 112 S. Ct. 3020 (1992) (remanded for reconsideration in light of *Lee v. Weisman)*, *aff'd on remand*, 977 F.2d 963 (5th Cir. 1992). The key factual circumstance that distinguished *Clear Creek* from *Weisman*, in view of this rather surprising decision by the Fifth Circuit, was that in *Clear Creek* the graduation invocation and benediction were both requested and delivered by members of the graduating class. 930 F.2d at 417. Some separationists maintain that it is unconstitutional per se to have any kind of prayer as part of a public school graduation ceremony, regardless of what steps the school authorities might take to guard against proselytization and pressures on those present to participate. Others take a less absolutist position. As noted by Professor Douglas Laycock, author of an amici curiae brief in *Lee v. Weisman* for a broad coalition of Christian and Jewish groups supporting retention of the Supreme Court's separationist jurisprudence:

I. *LEE v. WEISMAN*

A. The Lower Court Opinions

The *Weisman* case originated when Daniel Weisman of Providence, Rhode Island, learned that Principal Robert E. Lee of the Nathan Bishop Middle School planned to invite Rabbi Leslie Gutterman of Temple Beth El in Providence to deliver an invocation and benediction at the graduation of his daughter Deborah in June, 1989.[26] The Providence School Committee had a long-standing policy of permitting principals to invite clergymen to

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> [t]hese amici do not agree on more difficult hypothetical cases. Some of these amici believe that any government-sponsored prayer is unconstitutional, in any format and with any audience. Some of these amici believe that government-sponsored prayers are permissible in certain limited circumstances, but those circumstances are plainly not present here, and that it is not necessary to define them with precision in this case. All of these amici agree that Petitioners' coercion test is a fundamental threat to religious liberty.

Brief Amici Curiae of the American Jewish Congress, et al., in Support of Respondents at 2, Lee v. Weisman, 112 S. Ct. 2649 (1992) [hereinafter Amici Brief of the American Jewish Congress]. Other members of the broad coalition who participated in the amici brief included the Baptist Joint Committee on Public Affairs, the American Jewish Committee, the National Council of Churches of Christ in the U.S.A., the Anti-Defamation League of B'Nai B'rith, the General Conference of Seventh Day Adventists, the People for the American Way, the National Jewish Community Relations Advisory Council, the New York Committee on Public Education and Religious Liberty and James Andrews as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.).

It is not clear that the Supreme Court's decision imposed a total ban on public school graduation prayers, and Justice Scalia rather brashly assumed that the majority would countenance graduation prayers in the future as long as the authorities made plain that those present were not assumed to be participating in the prayers even if they stood up for them. *Weisman*, 112 S. Ct. at 2685 (Scalia, J., dissenting). The Court may have an early opportunity to clarify the matter if certiorari is sought and granted in *Jones v. Clear Creek Independent School District, infra* notes 199-204 and accompanying text.

26. Weisman v. Lee, 728 F. Supp. 68, 69 (D.R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *aff'd*, 112 S. Ct. 2649 (1992).

deliver such prayers at middle school and high school graduations.[27] The Assistant Superintendent of Schools had distributed to school principals "Guidelines for Civic Occasions," prepared by the National Conference of Christians and Jews, which suggested how to compose "public prayer in a pluralistic society" and stressed the importance of "inclusiveness and sensitivity."[28] Daniel Weisman, who is a practicing Jew,[29] had been offended when, at the graduation of his older daughter from the same school three years earlier, the minister who delivered the invocation had asked all present to give thanks to Jesus.[30]

After his protest fell on deaf ears, Weisman sought a temporary restraining order in federal district court to bar the prayers.[31] Judge Francis Boyle denied Weisman's application, which was filed only four days before graduation, because there was not enough time to consider it.[32] On June 20, 1989, the Weismans attended Deborah's graduation, at which Rabbi Gutterman delivered a 139-word invocation and a 114-word benediction.[33] The benediction and invocation were addressed to "God" and "Lord"

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27. *Id.*

28. *Id.*

29. Respondent's Brief in Opposition to Petition for Writ of Certiorari at 5, Lee v. Weisman, 908 F.2d 1090 (1990), *aff'd*, 112 S. Ct. 2649 (1992) [hereinafter Respondent's Brief in Opposition].

30. *See* Schweitzer, *supra* note 1, at 119 n.22. During the ceremony, "a benediction was offered where the audience was asked to rise, give thanks and then hear a prayer, all of which were addressed to Jesus Christ." Loren Israel, *And the Wall Comes Tumbling Down*, KAN. J.L. & PUB. POL'Y 79, 90 (Spring 1992) (quoting excerpts from Loren Israel, *Jew Who Initiated Church-State Test Case Wary of Outcome*, KAN. CITY JEWISH CHRON., Mar. 6, 1992, at 4). Weisman described his reaction to the interviewer as follows: "'It was as close to what I imagine a rape is like as anything I had ever experienced in that I was totally stripped of my identity . . . . There I was standing with my upbringing as a Jew--you're just not supposed to do this--and I had no way out and nowhere to go.'" *Id.* (quoting excerpts from Loren Israel, *Jew Who Initiated Church-State Test Case Wary of Outcome*, KAN. CITY JEWISH CHRON., Mar. 6, 1992, at 4).

31. *Weisman*, 728 F. Supp. at 69.

32. *Id.*

33. For the text of the prayers, see *Weisman*, 112 S. Ct. at 2652-53.

but were otherwise non-sectarian, although one sentence was taken from the Bible.[34]

The next month, Daniel Weisman filed an amended complaint seeking a permanent injunction against graduation prayers in the Providence schools.[35] The case was submitted on stipulated facts.[36] Applying the *Lemon v. Kurtzman* "three-pronged test," Judge Boyle concluded that the prayers violated the second prong[37] and therefore found it unnecessary to determine whether the other two prongs were violated.[38] Accordingly, he granted the injunction.[39] Judge Boyle maintained that a state action advanced religion when it created an identification of the state with a religion or with religion in general,[40] and he concluded that Rabbi Gutterman's prayers "create[d] an identification of schools with a deity, and therefore religion."[41] He further noted that the

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34. *See Micah* 6:8. The sentence in the benediction, "[w]e must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly," *Weisman*, 112 S. Ct. at 2653, was taken directly from *Micah* 6:8, which states: "He has showed you, O man, what is good; and what does the Lord require of you but to do justice, and to love kindness, and to walk humbly with your God?" *Id.*

35. The Court determined that the case was not moot and there was no question of the Weismans' standing because of the likelihood that an invocation and benediction would be offered when Deborah Weisman graduates from Classical High School in Providence, in which she is currently enrolled. *Weisman*, 112 S. Ct. at 2654.

36. *Weisman*, 728 F. Supp. at 69 n.1.

37. The second prong of the *Lemon* test requires that a challenged statute or practice have a primary effect that neither advances nor inhibits religion. *See supra* note 4.

38. *Weisman*, 728 F. Supp. at 71.

39. *Id.* at 75.

40. *Id.* at 71.

41. *Id.* at 72. Judge Boyle's decision relied heavily on Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985), where the Supreme Court invalidated a program in which the public school district leased classrooms at parochial schools for courses in secular subjects taught by the parochial school teachers, who were paid by the district. *Id.* at 375-78. The Court stated that "Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any - or all - religious denominations as when it attempts to inculcate specific religious doctrines." *Id.* at 389, *quoted in Weisman*, 728 F. Supp. at 71. As in

graduation prayers conveyed a preference for some religions "or for religion in general over no religion at all,"[42] and that schoolchildren who were members of other religions or non-believers might have felt that the school and government preferred beliefs other than their own.[43]

On appeal, the First Circuit affirmed on the basis of Judge Boyle's opinion.[44] Judge Bownes concurred in a separate opinion which concluded that the graduation prayers violated all three prongs of the *Lemon* test.[45] Judge Campbell dissented, pointing out that the "First Amendment . . . normally protects speech rather than suppressing it."[46] Furthermore, he found it "anomalous to outlaw Rabbi Gutterman's tolerant, benign, nonsectarian supplication--a message so entirely appropriate in that setting, and surely inoffensive to virtually all of those present."[47]

Principal Robert E. Lee of the Nathan Bishop Middle School, the principal of the Classical High School, which Deborah Weisman is now attending, and the members of the Providence School Committee submitted a petition for a writ of certiorari in December 1990. The Supreme Court granted certiorari on March 18, 1991.[48]

McCollum v. Board of Educ., 333 U.S. 203 (1948), the "symbolic union" between church and state created by the one functioning on the other's premises was deemed to constitute the "'concert or union or dependency' of church and state," which was unconstitutional. *Ball*, 473 U.S. at 391 (quoting Zorach v. Clauson, 343 U.S. 306, 312 (1952)), *quoted in Weisman*, 728 F. Supp. at 72. Judge Boyle concluded that Rabbi Gutterman's invocation and benediction presented an unconstitutional "symbolic union" of the state and schools with religion and religious practices. *Weisman*, 728 F. Supp. at 72.

42. *Weisman*, 728 F. Supp. at 72-73.

43. *Id.* at 73. Neither Judge Boyle nor the First Circuit nor the Supreme Court Justices noted the irony that the Weismans, who were Jewish, were suing to enjoin a rabbi's prayers, and the record contained no evidence that the prayers offended anyone else in the presumably non-Jewish majority who were present.

44. 908 F.2d 1090, 1090 (1st Cir. 1990).

45. *Id.* at 1094-95 (Bownes, J., concurring).

46. *Id.* at 1098 (Campbell, J., dissenting).

47. *Id.* (Campbell, J., dissenting).

48. Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 Ct. 1305 (1991).

B. The Supreme Court Case

At the Supreme Court level, the legal arguments of the parties revolved around two basic issues: whether *Weisman* was a school case or a public ceremonial prayer case, and what was the appropriate Establishment Clause test. Petitioners argued that Rabbi Gutterman's invocation and benediction were more closely analogous to the legislative chaplain's prayers which the Court had upheld in *Marsh v. Chambers,*[49] while respondents contended that *Weisman* was a school prayer case governed by *Engel v. Vitale*[50] and *Abington School District v. Schempp.*[51] Petitioners referred to the longstanding American tradition of ceremonial acknowledgments of religion which was reflected in such institutions as congressional chaplains, Thanksgiving Addresses by presidents, the national motto "In God We Trust," and patriotic songs expressing gratitude to God and invoking His blessings.[52]

The parties had stipulated that attendance at graduation was voluntary and not required in order to obtain a diploma.[53] Petitioners maintained that no unconstitutional coercion was possible in these circumstances, nor could Rabbi Gutterman's religious speech coerce religious choice, since "'[s]peech is not coercive; the listener may do as he likes.'"[54] Petitioners further argued that those attending the Nathan Bishop Middle School graduation ceremony "were in no way coerced to accept or support the relig-

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49. 463 U.S. 783 (1983). *See* Brief for the Petitioners on Writ of Certiorari at 30, Lee v. Weisman, 112 S. Ct. 2649 (1992) [hereinafter Petitioners' Brief]; Reply Brief for the Petitioners on Writ of Certiorari at 10, 908 F.2d 1090 (1st Cir. 1990), *aff'd*, 112 U.S. 2649 (1992) [hereinafter Petitioners' Reply Brief]; Petition for Writ of Certiorari at 8-14, Lee v. Weisman, 908 F.2d 1090 (1st Cir. 1990), *aff'd*, 112 U.S. 2649 (1992) [hereinafter Petition for Writ].

50. 370 U.S. 421 (1962).

51. 374 U.S. 203 (1963).

52. Petition for Writ, *supra* note 49, at 8-11.

53. *Weisman*, 112 S. Ct. at 2653.

54. Petitioners' Brief, *supra* note 49, at 37 (quoting American Jewish Congress v. City of Chicago, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting)); *see also id.* at 35-41.

ious beliefs expressed by Rabbi Gutterman."[55] According to petitioners, the audience was not required to join in, agree with, or even listen to the prayers. The graduation invocation and benediction, petitioners claimed, were "but brief segments of a much longer, otherwise entirely secular, ceremony."[56] Petitioners emphasized that the school authorities did not themselves deliver the prayers; they merely invited a private citizen to offer prayers which the citizen authored.[57] Nor, argued petitioners, did the graduation ceremony "'implicate the special nature of the teacher-student relationship - a relationship that focuses on the transmission of knowledge and values by an authority figure.'"[58] For all these reasons, petitioners contended, there could be no unconstitutional coercion.[59]

The Solicitor General argued that the Court should take this opportunity to "jettison" the *Lemon v. Kurtzman* test, which he said had produced so much confusion and so many anomalous results.[60] After a detailed criticism of its three "prongs," the Solicitor General urged the Court to replace the *Lemon* test with a new test based on coercion, which he deemed essential to an Establishment Clause violation.[61] He proposed a test modeled on the one Justice Kennedy had suggested in his opinion in *County of Allegheny v. ACLU*:[62] "[A] single, careful inquiry into whether the practice at issue provides direct benefits to a religion in a manner that threatens the establishment of an official church or compels persons to participate in a religious exercise contrary

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55. *Id.* at 41.

56. *Id.* at 42.

57. *Id.*

58. *Id.* (quoting Stein v. Plainwell Community Sch., 822 F.2d 1406, 1409 (6th Cir. 1987)). Peer pressure on the students to conform to the ideas expressed, moreover, would be limited by the presence of their parents, who would act as a buffer. *See* Petition for Writ, *supra* note 49, at 15; Petitioners' Reply Brief, *supra* note 49, at 18-19.

59. Petitioners' Brief, *supra* note 49, at 22.

60. Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at 6-8, 12, 908 F.2d 1090 (1990), *aff'd*, Lee v. Weisman, 112 S. Ct. 2649 (1992) [hereinafter Brief for the United States I].

61. *Id.* at 15, 18.

62. 492 U.S. 573 (1989).

to their consciences."[63] Since attendance at graduation ceremonies was not required to get a diploma, the Solicitor General and petitioners argued that it was impossible to find coercion or a violation of the Establishment Clause under the proposed test.[64]

Counsel for respondent[65] denied that coercion was a necessary element of an Establishment Clause violation. They refuted petitioners' argument that graduation prayers were consistent with the historical practices of the Framers of the Constitution by pointing out that the Supreme Court had noted that "'a historical approach is not useful in determining the proper roles of church and state in public schools . . . .'"[66] Without responding to the Solicitor General's detailed criticism of the *Lemon* test, respondent's counsel contended that graduation prayers violated all three prongs of the test,[67] and that the test itself was a sound distillation of nearly five decades of Establishment Clause case law.[68] They argued that petitioners' disagreement was not merely with

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63. Brief for the United States I, *supra* note 60, at 15. Justice Kennedy had stated:

> Our [Establishment Clause] cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so."

County of Allegheny, 492 U.S. at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)). The Solicitor General also cited American Jewish Congress v. City of Chicago, 827 F.2d 120, 135-37 (7th Cir. 1987) (Easterbrook, J., dissenting), and Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986), in support of his coercion test for Establishment Clause violations. Brief for the United States I, *supra* note 60, at 16.

64. Petitioners' Brief, *supra* note 49, at 43-44; Petitioners' Reply Brief, *supra* note 49, at 20; Brief of the United States I, *supra* note 60, at 18; Petition for Writ, *supra* note 49, at 22.

65. Two attorneys for the ACLU Foundation in New York City assisted Sarah Blanding, the Weismans' Rhode Island attorney, as co-counsel.

66. Respondent's Brief at 9, Lee v. Weisman, 112 S. Ct. 2649 (1992) (quoting Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987)).

67. *Id.* at 24-32.

68. *Id.* at 16-17.

the *Lemon* test, but with the entire body of Establishment Clause jurisprudence,[69] and they charged that adoption of petitioners arguments would wreak havoc and would disregard the vital rule of *stare decisis*.[70]

At the Supreme Court argument on November 6, 1991, the Justices quickly put Charles Cooper, counsel for petitioners, and Solicitor General Kenneth Starr on the defensive. Justice Kennedy expressed discomfort with petitioners' argument that there was no Establishment Clause violation because attendance at graduation was not required to get a diploma, and a student who found graduation prayers objectionable was free to remain absent. He stated:

> I find it very difficult to accept the proposition that it is not a substantial imposition on a young graduate to say you have your choice of -- I want to characterize it in a neutral way -- hearing this prayer, or absenting yourself from the graduation. In our culture, a graduation is a key event in the young person's life. The family comes, aunts, uncles, brothers, sisters. And I think it's a very, very substantial burden on the person to say that he or she cannot -- can elect not to go.[71]

Other Justices appeared to question Solicitor General Starr's distinction between classroom prayer and graduation prayer.[72] Justice Souter noted that the Court had to attempt to reconcile two traditions here, the "tradition of some religious expression on public occasions" and the tradition prohibiting prayer in the pub-

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69. *Id.* at 17.

70. *Id.* at 23-24.

71. Official Transcript, Proceedings Before the Supreme Court of the United States at 7-8, Lee v. Weisman, 112 S. Ct. 2649 (1992) [hereinafter Official Transcript] (Kennedy, J., questioning).

72. *See id.* at 23-24 (Justice O'Connor questioning the Solicitor General as to how, through his coercion test, he is able to distinguish between participating in classroom prayer and prayer at graduation commencement exercises); *id.* at 24-25 (Justice Stevens questioning the Solicitor General as to whether the distinction between prayers in the classroom and at graduation exercises hinges on the fact that attendance at the latter is voluntary but attendance at the former is not).

lic schools which was exemplified by *Engel v. Vitale*.[73] Under questioning from Justice Souter, the Solicitor General conceded that graduation prayer was more closely analogous to classroom prayer than to prayer at a presidential inauguration.[74]

C. Justice Kennedy's Opinion for the Court

The Supreme Court issued its decision in *Lee v. Weisman* near the end of its Term, on June 24, 1992. Justice Kennedy's opinion for the Court applied his coercion test and ignored the *Lemon v. Kurtzman* three-pronged test. Otherwise, however, his opinion represented a total victory for respondent's arguments and a corresponding rejection of those by the petitioners and the Solicitor General.

The dispositive factor in the Supreme Court's decision is that respondent won the battle of the analogies. The Court decided that *Weisman* was a school prayer case pure and simple which was governed by *Engel v. Vitale* and *Abington School District v. Schempp*,[75] rather than one involving public ceremonial prayer

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73. *Id.* at 28-29. In support of his argument that civil acknowledgments of religion in public life did not offend the Establishment Clause as long as they did not coerce participation in religious activities, the Solicitor General had noted that the early presidents, *including* Thomas Jefferson, invoked God's blessings in their inaugural addresses. Brief for the United States as Amicus Curiae Supporting Petitioners on Writ for Certiorari at 9-10, Lee v. Weisman, 112 S. Ct. 2649 (1992) [hereinafter Brief for the United States II]. The Solicitor General quoted the prayer of Thomas Jefferson for divine assistance in his second inaugural address, and Justice Scalia quoted the same prayer in his dissent. *Weisman*, 112 S. Ct. at 2680 (Scalia, J., dissenting). *See also* County of Allegheny v. ACLU, 492 U.S. 573, 671-72 n.9 (Kennedy, J., concurring in the judgment in part and dissenting in part) (quoting Rev. Billy Graham's invocation at President Bush's inauguration on January 20, 1989).

74. Official Transcript, *supra* note 71, at 29.

75. The opinion indicated that graduation ceremonies constituted "an environment analogous to the classroom setting." *Weisman*, 112 S. Ct. at 2660. Professor Laycock had argued:

> This is not a free speech case or an equal access case. It is a school prayer case, plain and simple. In terms of school sponsorship, government entanglement, and coercion of children, this case is indistinguishable from *Engel* and *Schempp*. It differs from those cases only in the frequency of the constitutional violation.

which was arguably permissible under *Marsh v. Chambers*.[76] Justice Kennedy's opinion simply ignored the manifold differences between graduation prayer and school prayer. The fact that Principal Lee had selected Rabbi Gutterman and had provided him with a copy of "Guidelines for Civic Occasions," prepared by the National Conference of Christians and Jews, meant that "the principal directed and controlled the content of the prayer,"[77] which became "a state-sponsored and state-directed religious exercise in a public school."[78]

This characterization of Rabbi Gutterman's invocation and benediction as state-sponsored and state-directed school prayer was of course fatal under Establishment Clause jurisprudence.[79] Justice Kennedy stated that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[80] He indicated

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Amici Brief of the American Jewish Congress, *supra* note 25, at 64.

76. *Weisman*, 112 S. Ct. at 2660.

77. *Id.* at 2656.

78. *Id.* at 2655. Ironically, the act of providing Rabbi Gutterman with the ecumenical pamphlet, which was obviously designed to reduce the danger of sectarian divisiveness, was one of the critical indicia of state control triggering an Establishment Clause violation in the Court's view. The Court noted that the practice of nonsectarian prayer characteristic of an emerging "civic religion" was no more permissible under the Establishment Clause than sectarian prayer. *Id.* at 2656-57. *See also* Engel v. Vitale, 370 U.S. 421, 430 (1962).

79. Indeed, as respondent had noted: "[T]his Court has never found a valid secular purpose [the first prong of the *Lemon* three-pronged test] for any type of government sponsored prayer in a public school setting." Respondent's Brief, *supra* note 66, at 25.

80. *Weisman*, 112 S. Ct. at 2658. In Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 296 (1990), Justice Kennedy had stated that the inquiry into whether the government was exerting pressure upon a student to participate in a religious activity "must be undertaken with sensitivity to the special circumstances that exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw." *Id.* at 261-62 (Kennedy, J., concurring in part and concurring in the judgment). *Lee v. Weisman* cited this passage as well as Justice Brennan's statement in Edwards v. Aguillard, 482 U.S. 578 (1987):

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not

that "prayer exercises in public schools carry a particular risk of indirect coercion."[81] Justice Kennedy noted that the students stood during the Pledge of Allegiance and remained standing for Rabbi Gutterman's prayers.[82] While he conceded that the act of standing was ambiguous, and could signify "adherence to a view or simple respect for the views of others,"[83] Justice Kennedy assumed that "for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the Rabbi's prayer."[84] It was improper for the state to place primary and secondary school children in this position, he argued, because psychological research demonstrated that children and adolescents are subject to pressure to conform from their peers.[85] He concluded that indirect social pressure to con-

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> purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.

Id. at 584 (citations omitted); *accord Weisman*, 112 S. Ct. at 2685 (Scalia, J., dissenting). *See also* Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329 (1963):

> [S]ince children of elementary and high school age are far less mature and intellectually developed than the public generally, since they are particularly unable to evaluate conflicting religious beliefs objectively, since they are especially susceptible to being influenced in religious choice, and since they are compelled by law to attend the site of these religious practices, there is a sound basis for giving distinctive treatment to solely religious practices in the public schools instead of treating them together with similar practices existing in our society generally.

Id. at 337-38 (footnotes omitted).

81. *Weisman*, 112 S. Ct. at 2658.

82. *Id.* at 2653. This was not clear, however, from the record in the case. *See infra* note 163 and accompanying text.

83. *Weisman*, 112 S. Ct. at 2658.

84. *Id.*

85. *Id.* at 2659 (citing articles in sociology and developmental psychology). *Cf.* Engel v. Vitale, 370 US. 421, 431 (1962) (placing financial support of government behind particular religious belief causes "indirect coercive pressure upon religious minorities to conform"). Justice Kennedy's analysis is strikingly similar to that of Professor Choper. In discussing "indirect coercive pressure" caused by peer pressure to conform to religious exercises by the favored majority, Professor Choper stated:

> It is universally recognized that such pressures in fact exist. Many writers of widely diverse backgrounds have observed that young people of minority religious groups are extremely sensitive about conspicuously absenting themselves from religious exercises conducted by the majority and that there is a powerful, albeit subtle, pressure to conform. The emotional strain is very frequently so great that it results in unwilling participation in preference to some amount of social ostracism.

Choper, *supra* note 80 at 343 (footnotes omitted). Professor Choper cited political scientists, law professors, practicing attorneys, and newspaper columnists for this proposition. He continued:

> Social psychologists and sociologists have pointed out that children place great importance on how they are esteemed by their classmates. The urge to conform to their classmates' attitudes is peculiarly strong, and "the fear of being accused by the others of wanting to be 'different'" and the "very strong need to remain a member of one's group" are carried so far as to cause these children to do and say things in accordance with the majority that they are convinced are wrong . . . . The option either to participate in the majority's religious worship or "to suffer the pain of psychic loneliness" has been recently described . . . as forcing these immature students "to choose between equally intolerable alternatives."

Id. at 344 (footnotes omitted).

In an article published in the *Washington Post* three days before the Supreme Court argument in *Lee v. Weisman*, Walter Dellinger, a leading constitutional scholar and law professor at Duke University Law School, described his painful childhood memories of being an outsider during a religious program in the public schools. Walter Dellinger, *Say Amen, or Else--Piety and the Law; The Court Revisits the School Prayer Decisions*, WASH. POST, Nov. 3, 1991, at C1. In the 1950s, the Charlotte, North Carolina public schools provided one hour of non-denominational Protestant Bible instruction per week to elementary school children. Dellinger, who was raised as a Catholic, had been told by his local church not to take part. *Id.* Dellinger's fifth grade classmates would stare at him and a Jewish classmate as they self-consciously left the room at 10:00 a.m. each Thursday when the Bible teacher arrived with Bible comics, maps, films, cookies, and Kool-Aid. *Id.* Dellinger stated that *Engel v. Vitale*, which was decided when he was a college student, "was the first judicial opinion I ever read, and it rested on a principle that made a lot of sense to me--that government itself may not seek either to promote or discourage religion." *Id.* He concluded that the Supreme Court's consideration of *Lee v. Weisman* meant that that principle was "now in jeopardy" because "[t]he relatively innocuous facts of . . . *Lee v. Weisman* make it a perfect vehicle for a ruling that reverses forty years of Supreme Court precedent on government-sponsored religion in the public schools." *Id.*

form was equivalent to more direct forms of state coercion, and that "the State, in a school setting, in effect required participation in a religious exercise."[86]

A similar dilemma was faced by a Jewish high school sophomore during explicitly Christian invocations offered at public school football games in Northern Florida, see Berlin v. Okaloosa Sch. Dist., No. PCA 87-30450-RV, 1988 WL 85937 (N.D. Fla. Mar. 1, 1988). For a thorough account of *Berlin*, see Schweitzer, *supra* note 1, at 129 n.80.

86. *Weisman*, 112 S. Ct. at 2659. Justice Kennedy later reiterated the point: "[T]he State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid." *Id.* at 2661.

The Supreme Court first acknowledged that religious programs in public schools can be coercive in Engel v. Vitale, 370 U.S. 421 (1962). *Engel* contains ambiguities which continue to engender disagreement about the need for coercion in Establishment Clause cases. In *Engel*, Justice Black stated that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of *direct* governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate *directly* to coerce nonobserving individuals or not." *Id.* at 430 (emphasis added). Without commenting on a distinction between direct and indirect coercion, counsel for respondent in *Weisman* quoted this statement in support of their argument that coercion was not necessary for an Establishment Clause violation and that "[t]his Court has consistently and unconditionally adhered to this principle whenever presented with a 'coercion' argument." Respondent's Brief, *supra* note 66, at 41.

However, it is not inconsistent with Justice Black's statement to argue, as Justice Kennedy does, that a demonstration of at least *indirect* compulsion is required in order to show an Establishment Clause violation. At the time *Engel* was decided, Professor Kauper argued that its ultimate rationale was unconstitutional coercion:

> Whatever significance may attach to the surface of the opinion in *Engel*, some aspects of the case do suggest that the decision finds its ultimate justification on the ground that the prayer practice carried a compulsive force notwithstanding its apparent voluntary character, and that it therefore resulted in violation of freedom of conscience. Why should the Court otherwise have emphasized all the elements of the exercise that gave it an official nature?

Paul G. Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031, 1061 (1963); *accord* Choper, *supra* note 80, at 342-43 (suggesting that *Engel* holding is "too broad" because of presence of indirect coercive pressure prayer program exerted on school children).

This is consistent with Justice Kennedy's view. He maintains that coercion is necessary to show a violation of the Establishment Clause, and he believes that the result in *Engel* was correct because coercion, albeit of the indirect variety, was present. *See* County of Allegheny v. ACLU, 492 U.S. 573, 661 n.1 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("[T]he prayer invalidated in *Engel* was unquestionably coercive in an indirect manner . . . ."). Elsewhere in *Engel*, however, Justice Black implies that the Establishment Clause can be violated when even *indirect* coercion is absent:

> When the power, prestige and financial support of government is placed behind a particular religious belief, *the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that.* Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and degrade religion.

370 U.S. at 431 (emphasis added).

Petitioners in *Weisman* criticized the statement that the purposes of the Establishment Clause "go much further" than prohibiting coercive government influence on religious belief as dictum, since the facts in *Engel* did include indirect government coercion. Petitioners' Brief, *supra* note 49, at 35. In contrast, Professor Laycock concluded that this statement and other statements in *Engel* "confirm[] the depth of the Court's belief that coercion is no essential part of establishment clause analysis." Amici Brief of the American Jewish Congress, *supra* note 25, at 39.

Thus, in *Engel v. Vitale*, Justice Black, the father of modern Establishment Clause jurisprudence, perhaps inadvertently sowed the seeds of confusion which helped spawn doctrinal disputes decades later. Similarly, Justice Black is widely criticized for inconsistency in his opinion for the Court in Everson v. Board of Educ., 330 U.S. 1 (1947), the cornerstone of Establishment Clause jurisprudence. While endorsing a "high and impregnable" wall of separation between church and state, the Court in *Everson* upheld the constitutionality of public financing of bus transportation of students to Catholic schools in a New Jersey township. *Id.* at 18. Justice Jackson's dissent charged that "the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in education matters." *Id.* at 19 (Jackson, J., dissenting). Both opponents and proponents of government aid to parochial schools found support for their positions in *Everson*, and the decision's ambiguities helped to perpetuate doctrinal conflicts between the two groups for decades to come. As one commentator noted, "[f]rom the outset it has been painfully clear that logical consistency and establishment clause jurisprudence were to have little in common." William P. Marshall, *"We Know It When We See It:" The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 495 (1986).

Justice Kennedy indignantly rejected the argument of petitioners and the Solicitor General that no impermissible coercion was possible since attendance at graduation was not required to obtain a diploma. He stated that graduation was "one of life's most significant occasions,"[87] a time for family celebration, and thus, "to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme."[88] He concluded that "[t]he Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation."[89]

Justice Kennedy distinguished prayers by a legislative chaplain, which were upheld in *Marsh v. Chambers*, on the grounds that adults are free to enter and leave at the opening of a state legislative session, whereas students at a graduation ceremony were not free to leave, and graduation prayers had far greater influence, force, and "constraining potential."[90] Moreover, since the faculty and principals controlled the precise contents of high school graduation programs, prayers by a clergyman chosen by the school constituted "a state-sanctioned religious exercise in which the student was left with no alternative but to submit."[91]

D. The Concurring Opinions

Justice Blackmun's concurring opinion, which was joined by Justices Stevens and O'Connor, insisted that government coercion is not a necessary condition of an Establishment Clause violation, although it obviously sufficed to show such a violation.[92] He described the origins of the *Lemon v. Kurtzman* three-pronged test, which he believed sound, as it was derived from earlier Supreme Court cases.[93] Echoing District Judge Boyle's opinion, he applied the *Lemon* test and concluded that by choosing Rabbi Gut-

87. *Weisman*, 112 S. Ct. at 2659.
88. *Id.*
89. *Id.* at 2660.
90. *Id.*
91. *Id.*
92. *Id.* at 2664 (Blackmun, J., concurring).
93. *Id.* at 2662-63 (Blackmun, J., concurring).

terman to deliver prayers at a public school event planned, supervised, and given by school officials, and by pressuring students to attend and to participate in the prayers, the government was "advancing and promoting religion" in violation of the second prong.[94]

Justice Souter's concurring opinion, his first opinion on the Establishment Clause as a member of the Supreme Court, was extremely significant since it revealed him as a staunch proponent of separation of church and state.[95] The opinion, which was longer than Justice Kennedy's, had two principal objectives: to refute nonpreferentialism, the doctrine that the Establishment Clause permits the government to aid all religions so long as it does not discriminate in favor of or against any;[96] and to refute the doctrine, to which Justice Kennedy evidently still subscribes, that coercion is necessary for a violation of the Establishment Clause.[97] Following Professor Laycock's approach, Justice

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94. *Id.* at 2664 (Blackmun, J., concurring).

95. *Id.* at 2667 (Souter, J., concurring). Justices Stevens and O'Connor concurred in Justice Souter's opinion. The strongest influence on Justice Souter appeared to be Professor Douglas Laycock of the University of Texas Law School, no fewer than three of whose articles he cited. *Id.* at 2669 n.2, 2676, 2678. Professor Laycock authored the Brief for Amici Curiae the American Jewish Congress, et al., in Support of Respondent, *supra* note 25. The American Jewish Congress and the Committee on Public Education and Religious Liberty have long been among the most active litigants on Establishment Clause issues, especially in combating state aid to religious schools. *See generally* FRANK J. SORAUF, THE WALL OF SEPARATION - THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE (1976).

96. *Weisman*, 112 S. Ct. at 2667-71 (Souter, J., concurring). Chief Justice Rehnquist espoused this theory in his dissent in Wallace v. Jaffree, 472 U.S. 38, 106 (1985) (Rehnquist, C.J., dissenting), *see infra* note 98; *see also* Robert L. Cord, *Church-State Separation: Restoring the 'No Preference' Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y 129 (1986); Douglas Laycock, *Nonpreferential Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986).

97. Professor Michael W. McConnell of the University of Chicago Law School is a leading proponent of the coercion theory. *See generally* McConnell, *supra* note 63. Justice Souter cited McConnell's article but concluded that its reading of the Establishment Clause is one which "the text of the Clause would not readily permit." *Weisman*, 112 S. Ct. at 2671 (Souter, J., concurring).

Souter persuasively argued that the evolution of the text of the Establishment Clause in the House and Senate in 1789, which he described in detail, indicated that the Framers were familiar with the concept of nonpreferential establishments of religion and intended to prohibit them.[98] Similarly, after examining relevant statements and actions of Jefferson and Madison when they were presidents, Justice Souter concluded that they understood the Establishment Clause to proscribe non-coercive endorsement of religion and not merely coercion.[99] Since the Free Exercise

98. *Weisman*, 112 S. Ct. at 2670 (Souter, J., concurring). In support of the nonpreferentialist theory, then Justice Rehnquist, in Wallace v. Jaffree, 472 U.S. 38 (1985), cited actions of the early federal government following ratification of the First Amendment, such as the fact that President Jefferson signed a treaty authorizing federal appropriations to pay for a Roman Catholic priest and church for the Kaskaskia Indians, who had become Catholics. *Id.* at 103 (Rehnquist, J., dissenting). The federal government in the early 1800s also subsidized other Christian groups' missions among the Indian tribes. Justice Souter indicated that such actions cannot validate what is clearly forbidden by the Establishment Clause, and he commented that "acts like the one in question prove only that public officials, no matter when they serve, can turn a blind eye to constitutional principle." *Weisman*, 112 S. Ct. at 2670 n.3 (Souter, J., concurring).

99. *Id.* at 2674-75 (Souter, J., concurring). As with aid to the Roman Catholic Church for the Kaskaskia Indians, *see supra* note 98, Justice Souter viewed actions of Presidents Jefferson and Madison favoring religion as lapses from principle (e.g. Jefferson's inclusion of religious references in his inaugural speeches), *id.* at 2674 n.5 (Souter, J., concurring), or as politically-motivated "backsliding" (e.g. Madison's proclamations during the War of 1812 calling for days of thanksgiving and prayer, after refusing to take such measures during his first three years in office). *Id.* at 2675 (Souter, J., concurring).

There is a definite element of question-begging to this approach. The observer can canvas the actions and statements of important Founding Fathers like Jefferson and Madison and divide them into two groups. Those which conform to his constitutional theory are deemed matters of principle and used as historical support for that theory. Those which do not so conform are characterized as instances of political compromise or expediency which show that the great man was also, after all, an elected politician who bent under the unprincipled winds of public opinion. Thus, the observer is not so much looking to the historical record for guidance as to how the First Amendment was understood by government leaders at the time of its enactment as he is examining that record for illustrations of what conforms to or does not

Clause[100] forbids religious coercion,[101] the coercion theory would render the Establishment Clause "a virtual nullity," a construction to be avoided if at all possible.[102]

Justice Souter's opinion conclusively documented the fact that Supreme Court precedents reject both nonpreferentialism and the coercion theory.[103] While he acknowledged that the Framers and the early presidents and congresses seemed to have differed in

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conform to his own theory. This is not to say that the observer's conclusions are necessarily erroneous, but merely to recognize the central importance of the observer's own contemporary perspective into which he fits the evidence of history.

The opposite approach is that exemplified by Justice Scalia and Marsh v. Chambers, 463 U.S. 783 (1983) (upholding constitutionality of Nebraska legislature's paid chaplain), according to which whatever is historical must be constitutional. *See Weisman*, 112 S. Ct. at 2679 (Scalia, J., dissenting) (citing New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.) ("a page of history is worth a volume of logic")). Justice Scalia has adhered to this principle in other areas of the law. *See, e.g.*, Burnham v. Superior Court, 110 S. Ct. 2105, 2110-13, 2116-17 (1990) (upholding exercise of personal jurisdiction by forum state over non-resident served with process while in the jurisdiction, following examination of judicial precedents dating back to 1793). Justice Kennedy appeared to adhere to this view until *Lee v. Weisman*. In *County of Allegheny v. ACLU*, Justice Kennedy stated that "[a] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause." 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). Justice Scalia, of course, taxed Justice Kennedy with violating this principle in *Lee v. Weisman*. 112 S. Ct. at 2678-79 (Scalia, J., dissenting).

100. U.S. CONST. amend. I, cl. 2. The Free Exercise Clause provides: "Congress shall make no law . . . prohibiting the free exercise []of [religion] . . . ." *Id.*

101. *See* Torcaso v. Watkins, 367 U.S. 488, 496 (1961) (Maryland statute requiring notary public to declare belief in God "unconstitutionally invade[d] the appellant's freedom of belief"); *see also* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963) ("The distinction between the two clauses is apparent--a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended."); Engel v. Vitale, 370 U.S. 420, 430 (1962) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct government compulsion . . . .").

102. *Weisman*, 112 S. Ct. at 2673 (Souter, J., concurring).

103. *Id.* at 2667-68, 2671-72 (Souter, J., concurring).

their views of the Establishment Clause, and they certainly varied in their practices,[104] he demonstrated that some of them were even more separationist than present law requires.[105] Furthermore, Justice Souter, a strong proponent of *stare decisis*, maintained that the Court "should stick to [the settled law] absent some compelling reason to discard it,"[106] and he determined that petitioners and the Solicitor General had failed to make a case for changing it.[107] Finally, he concluded that the state endorsement of religion by petitioner school officials, through their sponsorship of "official prayers delivered to a captive audience of public school students and their families,"[108] did not "lift a discernible burden on the free exercise of religion"[109] in this case and therefore could not be legitimized as a permissible accommodation of religion under the Establishment Clause.[110]

E. Justice Scalia's Dissent

Justice Scalia's dissent was unusually vitriolic, even for him. Its harsh tone may be due in part to his outrage at having a former ally appear to switch constitutional sides.[111] Justice Scalia

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104. For instance, "Presidents Washington and Adams unapologetically marked days of 'public thanksgiving and prayer.'" *Id.* at 2675 (Souter, J., concurring) (quoting Robert L. Cord, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 53 (1988)).

105. For instance, Madison deemed the use of public money to support congressional and military chaplains "a palpable violation of . . . Constitutional principles." *Id.* at 2675 n.6 (Souter, J., concurring) (quoting *Madison's Detached Memoranda*, 3 WM. & MARY Q. 534, 558 (E. Fleet ed. 1946)). However, both practices have been upheld. *See* Marsh v. Chambers, 473 U.S. 783 (1983) (legislative chaplains); Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985) (military chaplains).

106. *Weisman*, 112 S. Ct. at 2668 (Souter, J., concurring) (citing Payne v. Tennessee, 111 S. Ct. 2597, 2617-18 (1991) (Souter, J., concurring)).

107. *Id.* at 2668 (Souter, J., concurring).

108. *Id.* at 2678 (Souter, J., concurring).

109. *Id.* at 2677 (Souter, J., concurring).

110. *Id.* (Souter, J., concurring). *See also supra* note 12.

111. Justice Kennedy was regarded by some as a protege of Justice Scalia following his appointment to the Supreme Court. *See* W. John Moore, *Great Right Hope*, 24 NAT'L J. 1613, 1659 (1992); Terry Carter, *Crossing the*

ridiculed Justice Kennedy's opinion, labeling it "incoherent,"[112] an exercise in "social engineering,"[113] an example of "psychology practiced by amateurs,"[114] a "psycho-journey,"[115] and "a jurisprudential disaster."[116] He called Kennedy's psychological coercion test "boundless, and boundlessly manipulable,"[117] the "instrument of destruction,"[118] and "the bulldozer of its social engineering" which the Court invented in order to lay waste a venerable tradition of prayer in public school graduation ceremonies.[119]

In *County of Allegheny v. ACLU*, Justice Kennedy had stated that "[a] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause."[120] In light of the fact that graduation prayers had been a common part of public high school graduation ceremonies for

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Rubicon, CAL. LAW., Oct. 1992, at 39, 104; Richard C. Reuben, *Man in the Middle*, CAL. LAW., Oct. 1992, at 34, 36. Justice Scalia concurred in Justice Kennedy's opinions in County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part), and in Board of Educ. of Westside Community Sch. v. Mergens, 110 S. Ct. 2356, 2376 (1990) (Kennedy, J., concurring in part and concurring in the judgment). In an obvious swipe at Justice Kennedy, whom he accused of inconsistency with his opinion in *County of Allegheny v. ACLU*, Justice Scalia charged that the Court's decision demonstrates "why our Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people." *Weisman*, 112 S. Ct. at 2679 (Scalia, J., dissenting).

112. *Weisman*, 112 S. Ct. at 2678, 2681 (Scalia, J., dissenting).

113. *Id.* at 2679 (Scalia, J., dissenting).

114. *Id.* at 2681 (Scalia, J., dissenting).

115. *Id.* at 2684 (Scalia, J., dissenting).

116. *Id.* at 2685 (Scalia, J., dissenting).

117. *Id.* at 2679 (Scalia, J., dissenting).

118. *Id.* (Scalia, J., dissenting).

119. *Id.* (Scalia, J., dissenting).

120. 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part), *quoted in Weisman*, 112 S. Ct. at 2678 (Scalia, J., dissenting).

over a century,[121] Justice Scalia believed that they were entitled to the presumption of constitutionality which long-standing practices deserve.[122] In support of that presumption, Justice Scalia gave a lengthy series of examples of the American tradition of public ceremonies featuring prayers of thanksgiving and petition from the administration of George Washington to that of George Bush.[123]

Justice Scalia derided the Court's concept of psychological coercion. He contended that it was "absurd" to claim that those who remained seated during the prayers had participated in them.[124] With regard to those who stood for the prayers, Justice Scalia noted that since the Court had conceded that even the act of standing is ambiguous in our culture and might manifest mere respect rather than participation, it could not accurately conclude that a "reasonable dissenter . . . could believe that the group exercise signified her own participation or approval."[125] Justice Scalia also accused Justice Kennedy of distorting the facts when he claimed that the principal and school officials "directed and controlled the content of [Rabbi Gutterman's] prayer," "monitor[ed] prayer," attempted to "'compose official prayers,'" and were pervasively involved in religious activity.[126] In contrast to these claims, Justice Scalia observed, the record showed only that the school officials had invited Rabbi Gutterman, provided him with the brochure on ecumenical prayer, and advised him that the prayers should be non-sectarian; nothing remotely "suggest[ed] that school officials ha[d] ever drafted, edited,

121. Justice Scalia referred to what may have been the first public high school ceremony in Connecticut in July, 1868. The ceremony took place in a church hall, and long prayers were delivered. *Weisman*, 112 S. Ct. at 2680-81 (Scalia, J., dissenting).

122. *Id.* at 2679 (Scalia, J., dissenting).

123. *Id.* at 2679-80 (Scalia, J., dissenting).

124. *Id.* at 2682 (Scalia, J., dissenting).

125. *Id.* (Scalia, J., dissenting). In any event, Justice Scalia stated, the Court's test would equally invalidate the Pledge of Allegiance immediately preceding Rabbi Gutterman's prayers, which the Court had not questioned. *Id.* (Scalia, J., dissenting).

126. *Id.* at 2683 (Scalia, J., dissenting) (quoting Justice Kennedy's majority opinion, *id.* at 2656).

screened or censored graduation prayers, or that Rabbi Gutterman was a mouthpiece of the school officials."[127] Justice Scalia concluded that illegitimate "coercion" should be limited for Establishment Clause purposes to "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*."[128] No such coercion was present in Rabbi Gutterman's invocation and benediction, which no one had been legally compelled to recite.[129]

Justice Scalia attacked the "formulaic abstractions" which had long characterized the Court's Establishment Clause jurisprudence.[130] The foremost of these was the *Lemon v. Kurtzman* three-pronged test. By ignoring it in *Weisman*, Justice Scalia believed the Court had buried the test, a result which he regarded as "the one happy byproduct of the Court's otherwise lamentable decision."[131] He also contended that invocations and benedictions would be able to survive the Court's decision so long as school authorities announced orally or in writing that no one was compelled to join in and rise for the prayers, and that rising did not necessarily signify joining in them.[132] He concluded by expressing regret that the Supreme Court had taken the bold step of trying to banish from thousands of future graduations "the expres-

127. *Id.* (Scalia, J., dissenting).

128. *Id.* at 2683 (Scalia, J., dissenting).

129. *Id.* at 2684 (Scalia, J., dissenting). Justice Scalia called the Court's claims that the State had for all practical purposes compelled participation in the prayers "extravagant." *Id.* (Scalia, J., dissenting). Any subtle social "coercive pressures" to participate which students may have experienced, in the absence of any penalty or discipline for failure to take part, were "utterly devoid of legal compulsion" and in no way comparable to the expulsion of the students who refused to join in the Pledge of Allegiance in West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 629-30 (1943). *Id.* at 2684 (Scalia, J., dissenting). Justice Scalia noted that in *Barnette*, the students were expelled and their parents were threatened with prosecution and incarceration for causing delinquency. *Id.* at 2684-85 (Scalia, J., dissenting).

130. *Id.* at 2685 (Scalia, J., dissenting).

131. *Id.* (Scalia, J., dissenting).

132. *Id.* (Scalia, J., dissenting). This meant that the case was "a jurisprudential disaster and not a practical one." *Id.* (Scalia, J., dissenting).

sion of gratitude to God that a majority of the community wishes to make."[133]

II. ANALYSIS AND DISCUSSION

A. The Supreme Court in Flux

Like *Planned Parenthood of Southeastern Pennsylvania v. Casey,*[134] in which the same five Supreme Court Justices[135] reaffirmed the fundamental constitutional right to an abortion,[136] *Lee v. Weisman* is a compromise decision with conflicting undercurrents which have antagonized those on both sides of the issue. *Casey* dashed the hopes of the anti-abortion movement when it squarely reaffirmed the "essential holding" of *Roe v. Wade,*[137] but it also alarmed abortion rights supporters when it upheld all but one of Pennsylvania's restrictions on abortion.[138]

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133. *Id.* at 2686 (Scalia, J., dissenting).

134. 112 S. Ct. 2791 (1992).

135. In *Lee v. Weisman*, Justice Kennedy delivered the opinion of the Court, in which Justices Blackmun, Stevens, O'Connor, and Souter joined. In *Casey*, Justices O'Connor, Kennedy, and Souter delivered the opinion of the Court reaffirming the fundamental constitutional right to an abortion, and Justices Stevens and Blackmun filed separate concurring opinions.

136. *Casey*, 112 S. Ct. at 2804.

137. *Id.*; Roe v. Wade, 410 U.S. 113 (1973) (establishing the fundamental constitutional right to abortion). *See* Rorie Sherman, *Shaping the Abortion Debate*, NAT'L L.J., Nov. 30, 1992, at 1.

138. *Casey*, 112 S. Ct. at 2832-33. Adhering to its holding in Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976), the Court struck down a requirement in Pennsylvania that a woman notify her spouse before undergoing an abortion. *Id.* at 2826-31. However, the Supreme Court upheld the Pennsylvania statute's narrowly defined medical emergency situations, *id.* at 2822; the informed consent requirement, *id.* at 2822-26; the parental consent provision, *id.* at 2832; and the statutory filing requirement. *Id.* at 2832-33. Furthermore, the Court rejected *Roe v. Wade's* trimester framework, *id.* at 2818, and it adopted a new "undue burden" standard, *id.* at 2819, which led it to overrule two decisions in which it had struck down restrictions on abortions in the past. *Id.* at 2819, 2823-25, *overruling* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) and City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) (to

Similarly, *Weisman* marked a defeat for the forces seeking a major restructuring of the Court's Establishment Clause jurisprudence, since the Court rejected calls for the repudiation of the *Lemon v. Kurtzman* three-pronged test,[139] and it took Establishment Clause jurisprudence one step further to strike down a longstanding tradition in American life of public prayer at graduations.[140] On the other hand, despite their sharp differences on how it should be applied to the facts of the case, Justice Kennedy and the four dissenting Justices constituted a new majority in favor of the coercion test.[141] Thus, while it has not been explicitly overruled, the days of the *Lemon* three-pronged test seem numbered.

The pivotal votes in both *Casey* and *Weisman* were those of Justices O'Connor, Souter, and particularly Kennedy, who may come to comprise a new moderate center on the Supreme Court.[142] Justice O'Connor had been gravitating towards a more

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the extent that it permits states to express a preference for childbirth and enact legislation promoting mature and informed decisions, in pursuit of their important interest in "potential human life").

139. *Weisman*, 112 S. Ct. at 2655 ("We do not accept the invitation . . . to reconsider our decision in *Lemon v. Kurtzman* . . . .").

140. *See supra* notes 13, 121 and accompanying text.

141. *Weisman*, 112 S. Ct. at 2658; *id.* at 2684 (Scalia, J., dissenting, joined by Chief Justice Rehnquist and Justices White and Thomas). In his opinion, Justice Scalia stated "I have no quarrel with the Court's general proposition that the Establishment Clause 'guarantees that government may not coerce anyone to support or participate in religion or its exercises.'" (Scalia, J., dissenting) (quoting Justice Kennedy's majority opinion, *id.* at 2655). While Justice Scalia did not describe the test he would apply in Establishment Clause cases, his test is obviously limited to coercion and does not encompass the kind of Establishment Clause violation short of coercion which Justices Blackmun and Souter found present. *Id.* at 2661-67 (Blackmun, J., concurring); *id.* at 2667, 2671-78 (Souter, J., concurring).

142. *See* Marcia Coyle, *New Trio Stands Up To Court's Hard Right*, NAT'L L.J., Aug. 31, 1992, at S1; Stuart J. Taylor, Jr., *The Supreme Court's New Centrist Vision*, AM. LAW., Sept., 1992, at 32. Interestingly, when Justices O'Connor, Souter, and Kennedy voted together, they were on the winning side every time during the 1991-92 Term. Linda Greenhouse, *supra* note 6, at 1. Justices Souter and Kennedy were almost always on the winning side; each dissented in only eight of 108 cases that the Court decided with full opinions

separationist stance for some time, as exemplified by her "endorsement" version of the *Lemon* three-pronged test.[143] Justice Souter's views on the Establishment Clause had not been publicly known before,[144] and his staunchly separationist concurrence in *Weisman* may have been an unpleasant surprise to his sponsors in the Bush Administration, who presumably sought in his appointment a recruit to the conservative Rehnquist wing of the Court.[145]

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during that Term. *Id.* Justice Souter was in the majority in 13 of 14 cases which the Court decided by a 5-4 vote during that Term. *Id.*

143. Justice O'Connor first articulated her endorsement test in Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). According to Justice O'Connor, "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688. She later refined her endorsement test in Wallace v. Jaffree, 472 U.S. 38, 77-79 (1985) (O'Connor, J., concurring). *See also* Donald L. Beschle, *The Conservative as Liberal: The Religious Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 169 (1986). While Justice O'Connor concurred in *Lynch*, that the City of Pawtucket's nativity scene displayed in a privately owned park was constitutional, 465 U.S. at 694, she concluded that a similar nativity scene in a county courthouse was unconstitutional in County of Allegheny v. ACLU, 492 U.S. 573, 637 (1989) (O'Connor, J., concurring in part and concurring in the judgment). In *County of Allegheny v. ACLU*, Justices Brennan and Stevens adopted her endorsement test, *id.* at 654-55, which Justice O'Connor defended against sharp criticism from Justice Kennedy. *Id.* at 627-32 (O'Connor, J., concurring in part and concurring in the judgment).

144. According to Professor Cass Sunstein of the University of Chicago, a computerized search of law journals (presumably LEXIS or WESTLAW) revealed that Justice Souter, at the time he was nominated, had written no law review articles. James Vicini, *Bush Stuns Experts By Quickly Deciding on Supreme Court Choice*, REUTERS, July 24, 1990.

145. At the time of his appointment to the Supreme Court, it was widely reported that the man who proposed and championed Justice Souter's appointment was John Sununu, then President Bush's Chief of Staff. *See* Dom Bonafede, *The Ultimate Seduction*, 23 NAT'L J. 1153, 1205 (1991). In 1983, John Sununu, then Governor of New Hampshire, had appointed Souter Justice of the New Hampshire Supreme Court. James Vicini, *supra* note 144.

The biggest surprise of all was Justice Kennedy, whose outspoken dissent in *County of Allegheny v. ACLU*[146] had seemed to rank him as a solid member of the conservative accommodationist wing of the Court on Establishment Clause issues.[147] In *Weisman*, Justice Kennedy found himself on the same side as Justices Blackmun, Stevens and O'Connor, with whom he had sharply differed in *County of Allegheny v. ACLU*, and on the opposite side from Chief Justice Rehnquist and Justices Scalia and White, who had concurred with him in that case. Justice Kennedy was located precisely at the Court's center of gravity on the issues in *Weisman*. His vote was essential to the 5-4 *Weisman* holding, and the leverage he exerted in consequence may explain why the separationist bloc permitted him to speak for it, even though he did not budge from the coercion theory he had broached in *County of Allegheny v. ACLU*.[148] As a result, his opinion pecu-

146. 492 U.S. 573, 655-79 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). Chief Justice Rehnquist and Justices White and Scalia joined in Kennedy's opinion.

147. *See* John M. Hartenstein, *A Christmas Holiday Celebration In The Public Elementary Schools Is An Establishment Of Religion*, 80 CAL. L. REV. 981, 1022 (1992); Kenneth O. McArtor, *A Conservative Struggles With Lemon: Justice Anthony M. Kennedy's Dissent In Allegheny*, 26 TULSA L.J. 107, 120-21 (1990).

148. One could roughly analogize Justice Kennedy's pivotal central position in *Weisman* to that of Justice Powell in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). In *Bakke*, the Court was divided into two groups of four, with Justice Powell, who announced the judgment of the Court, as the swing vote on each issue. On the issue of holding that Davis Medical School's admissions program was unlawful and thus directing Bakke's admission, *id.* at 271, Justice Powell was joined by Chief Justice Burger and Justices Stewart, Rehnquist and Stevens. *Id.* at 421 (Stevens, J., concurring in the judgment). On the issue that Davis Medical School could take race into consideration in its admissions process, *id.* at 272, Justice Powell was joined by Justices Brennan, White, Marshall, and Blackmun. *Id.* at 324-26 (Brennan, J., concurring in the judgment in part and dissenting in part). Thus, while no other Justice agreed with him on all the issues, Justice Powell's opinion was subsequently given central importance by the lower courts. *See* Hammon v. Barry, 813 F.2d 412, 431 (D.C. Cir. 1987) (considered Justice Powell's position, rejecting specified percentage of a particular group simply because of its race as facially invalid, "the law of the land"); Talbert v. City of Richmond, 648 F.2d 925, 928-29 (4th Cir. 1981) (followed Justice Powell's justification for upholding

liarly reflects his own views; while the other separationist Justices could agree with his holding as a sort of lowest common denominator,[149] their more pronounced separationist views had to find expression in Justice Blackmun's[150] and Justice Souter's opinions.[151]

B. Justice Kennedy's Tortured Opinion

Justice Kennedy stated in *Weisman* that "[o]ur Establishment Clause jurisprudence remains a delicate and fact-sensitive one . . . ."[152] Yet, when one contrasts the facts in the record with Justice Kennedy's treatment of them, it is hard to resist the conclusion that he is tailoring the facts to fit his own rigid preconceptions.[153] As Justice Kennedy acknowledged, "[t]he record

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consideration of race in affirmative action program); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 691 (6th Cir. 1979) (agreed with Justice Powell's position that Title VI proscription of race based classifications extended only so far as Fourteenth Amendment's Equal Protection Clause); Hayes v. City of Charlotte, N.C., 802 F. Supp. 1361, 1375 (W.D.N.C. 1992) (agreed with Justice Powell's view that discrimination for its own sake violated Equal Protection Clause of Fourteenth Amendment); M. C. West, Inc. v. Lewis, 522 F. Supp. 338, 345 (M.D. Tenn. 1981) (followed approach "begun" by Justice Powell permitting "dissimilar treatment when one branch of the government has determined that a certain group has suffered from prior wrongdoing and deserves aid and rehabilitation").

149. While Justices Blackmun, O'Connor, Stevens, and Souter, consistent with Supreme Court precedent, rejected Kennedy's view that coercion was *required* to find an Establishment Clause violation, coercion was more than sufficient to find such a violation under their approach. The Supreme Court stated that coercion was not a prerequisite of an Establishment Clause violation in Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1973), Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222-23 (1963), and Engel v. Vitale, 370 U.S. 421, 430 (1962). Solicitor General Starr labeled these as "isolated statements" which he urged the Court to reconsider. Brief of the United States I, *supra* note 60, at 6-7.

150. *Weisman*, 112 S. Ct. at 2667 (Blackmun, J., concurring).

151. *Id.* at 2676 (Souter, J., concurring).

152. *Id.* at 2661. Justice Scalia's dissent charged that the Court had not satisfied this standard. *Id.* at 2684 (Scalia, J., dissenting).

153. The Supreme Court has evinced a casual attitude towards the facts in other Establishment Clause cases. In Aguilar v. Felton, 473 U.S. 402 (1985), for instance, Justice Brennan hypothesized that the predominantly non-Catholic

in this case is sparse in many respects . . . ."[154] What the record showed was that Principal Lee chose Rabbi Gutterman to give an invocation and benediction at the middle school graduation, provided him with the pamphlet entitled "Guidelines for Civic Occasions" prepared by the National Conference of Christians and Jews, and "advised him the invocation and benediction should be non-sectarian."[155] Apart from that, however, Rabbi Gutterman apparently was on his own. There is no indication that Principal Lee, or any other school official, helped write Rabbi Gutterman's prayers, or that Rabbi Gutterman submitted prayers for review by school officials, or that school officials were aware of the prayers' content before Rabbi Gutterman delivered them, or that school officials made any comments about the prayers to Rabbi Gutterman afterwards.

Yet, Justice Kennedy stated that Principal Lee "directed and controlled the content of [Rabbi Gutterman's] prayer,"[156] that school officials "monitored prayer,"[157] and attempted to "'compose official prayers.'"[158] Justice Kennedy further found that the "government involvement with religious activity in this case was pervasive,"[159] and that "State officials direct[ed] the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools,"[160] and that school officials "compel[led students] to participate in a religious exercise."[161]

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public school teachers involved might become instruments of Catholic indoctrination when they entered Catholic parochial schools to provide remedial education, *id.* at 409-13, despite the total absence in the record of any evidence this had ever happened during the twenty years of the program. This chimerical "finding" led Justice Brennan to conclude that the program of public aid violated the Establishment Clause. *Id.* at 414.

154. *Weisman*, 112 S. Ct. at 2653.
155. *Id.* at 2652.
156. *Id.* at 2656.
157. *Id.*
158. *Id.* (quoting Engel v. Vitale, 370 U.S. 421, 425 (1962)).
159. *Id.* at 2655.
160. *Id.*
161. *Id.* at 2661.

These characterizations grossly exaggerate the nature and extent of the school's role in the ceremony.[162] Unlike classroom prayer, where instruction has a pedagogical and inculcative purpose, the purpose of graduation ceremonies is celebration. Rabbi Gutterman did not ask those present to participate in his prayers, and the record does not even disclose whether they stood for the prayers.[163] Arguably, the presence of the parents and friends acted as a "buffer," lessening any intrusive impact of the prayers on students with different religious views. Finally, graduation ceremonies take place only once a year, and students who attended only their own graduations would experience the invocation and benediction only once in four years,[164] in contrast to the daily classroom prayers outlawed in *Engel* and *Schempp*. For all these reasons, petitioners had argued that graduation prayers resembled legislative prayers more closely than classroom prayers, and that *Marsh v. Chambers*[165] therefore governed.[166]

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162. Justice Scalia's comment seems on the mark: "These distortions of the record are, of course, not harmless error: without them the Court's solemn assertion that the school officials could reasonably be perceived to be 'enforc[ing] a religious orthodoxy,' would ring as hollow as it ought." *Id.* at 2683 (Scalia, J., dissenting) (citation omitted).

163. Justice Kennedy stated that "the students stood for the Pledge of Allegiance and remained standing during the Rabbi's prayers." *Id.* at 2653 (citing Official Transcript, *supra* note 71, at 38). Sarah A. Blanding, counsel for respondent Weisman, had contended at oral argument that the children at the Nathan Bishop Middle School graduation were seated together separate from their parents and "remained standing for the purposes of listening to the invocation." Official Transcript, *supra* note 71, at 38. When pressed by Chief Justice Rehnquist, however, she admitted that this was not apparent from the record and was not contained in the parties' agreed statement of facts. *Id.*

164. While their infrequency might be thought to lessen the likelihood that graduation prayers violated the Establishment Clause, Justice Kennedy drew the opposite conclusion: graduation prayers were "especially improper" because of the "singular importance" of graduation in students' lives since they had prepared for it and looked forward to it for years and had no real alternative to attending. *Weisman*, 112 S. Ct. at 2661.

165. 463 U.S. 783 (1983) (upholding constitutionality of Nebraska state legislature's chaplain).

166. *See supra* note 49 and accompanying text.

Justice Kennedy rejected the analogy to *Marsh* by contrasting the atmosphere at a state legislative session, where adults are free to enter and leave, with the "constraining potential" of school graduations, all aspects of which are closely controlled by teachers and principals, and "in which the student was left with no alternative but to submit."[167] But he simply ignored most of petitioners' proffered distinctions between graduation prayers and classroom prayers, preferring instead to equate the two.[168] The inevitable result was that graduation prayers were constitutionally defective under *Engel* and *Schempp*.[169]

Moreover, Justice Kennedy's conclusion that the students were coerced into participation in Rabbi Gutterman's prayers is based on shaky premises. As indicated above, the record does not even show that they stood for the prayers.[170] Assuming that they did stand, Justice Kennedy conceded that "in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others."[171] In light of this fact, his conclusion that "a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of

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167. *Weisman*, 112 S. Ct. at 2660.

168. Justice Kennedy's only explicit acknowledgment that he was equating the two contexts for purposes of analysis is a conclusory reference in passing to graduation as "an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high." *Id.*

169. That equating a challenged practice with the classroom prayers in *Engel* was constitutionally fatal in Justice Kennedy's view was clear from his dissenting opinion in *County of Allegheny v. ACLU*. He stated that "[t]he prayer invalidated in *Engel* was unquestionably coercive in an indirect manner," 492 U.S. 573, 661 n.1 (Kennedy, J., concurring in the judgment in part and dissenting in part), and that *Engel* involved constitutionally forbidden "compelling or coercing participation or attendance at a religious activity . . . ." *Id.* at 660 (Kennedy, J., concurring in the judgment in part and dissenting in part). He concluded that the creche in the county courthouse building was constitutional since "[n]o one was compelled to observe or participate in any religious ceremony or activity." *Id.* at 664 (Kennedy, J., concurring in the judgment in part and dissenting in part). *Accord Weisman*, 112 S. Ct. at 2658 ("[P]rayer exercises in public schools carry a particular risk of indirect coercion . . . .").

170. *See supra* note 163 and accompanying text.

171. *Weisman*, 112 S. Ct. at 2658.

it"[172] is dubious. In our democratic society, people are accustomed to hearing views expressed at public meetings with which they disagree, but their silence on such occasions does not signify forced acquiescence, as Justice Scalia pointed out.[173] And while peer pressure on dissenting students to stand in respect while the rabbi prayed was no doubt real and strong, it scarcely constituted state "coercion."

Justice Kennedy's opinion does not cite *West Virginia Board of Education v. Barnette*.[174] *Barnette* furnishes an example of genuine state coercion of dissenting students: if Jehovah's Witness students failed to pledge allegiance to the flag, which their religion regarded as sinful idol worship, they could be expelled from school and their parents were in danger of prosecution for causing delinquency.[175] As Justice Scalia noted, such real governmental coercion is a far cry from the putative social and peer pressures to conform exerted on those who may have found Rabbi Gutterman's prayers offensive.[176]

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172. *Id.*

173. *Id.* at 2681-82 (Scalia, J., dissenting). As Judge Easterbrook had stated, "[s]peech is not coercive; the listener may do as he likes." American Jewish Congress v. Chicago, 827 F.2d 120, 129 (1987) (Easterbrook, J., dissenting), *quoted in Weisman*, 112 S. Ct. at 2684 (Scalia, J., dissenting).

174. 319 U.S. 624 (1943).

175. *Id.* at 626-29.

176. *Weisman*, 112 S. Ct. at 2684 (Scalia, J., dissenting). One commentator attributes Justice Kennedy's conceptual gymnastics here to an understandable desire to avoid applying the *Lemon* test even while holding the graduation prayers unconstitutional:

> [A]s the majority opinion itself suggested, Principal Lee's involvement in shaping the content of the prayer violated the "excessive entanglement" prong of the *Lemon* test. Thus, a straightforward application of the *Lemon* test would have resulted in an undeniable conclusion that the prayers violated the Establishment Clause. Instead of applying its settled Establishment Clause analysis, however, the Court chose to arrive at the same result by the difficult process of inventing a coercion test that significantly expands the traditional notion of coercion.

The Supreme Court, 1991 Term: Leading Cases, 106 HARV. L. REV. 163, 263-64 (1992). Justice Scalia's proposal that "coercion" for Establishment Clause purposes be limited to "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*," *Weisman*, 112 S. Ct. at 2683

Another curious aspect of Justice Kennedy's opinion is that its great empathy for the plight of the dissenting student listening to Rabbi Gutterman's prayers is based on plausible but unfounded factual premises. He stated:

> The Government's argument gives insufficient recognition to the real conflict of conscience faced by this young student. The essence of the Government's position is that with regard to a civic, social occasion of this importance it is the objector, not the majority, who must take unilateral and private action to avoid compromising religious scruples, here by electing to miss the graduation exercise. This turns conventional First Amendment analysis on its head . . . .[177]

C. Did the Court Ignore Standing Requirements in Lee v. Weisman?

Plaintiff Deborah Weisman's religious scruples, however, were not threatened by Rabbi Gutterman's prayers, so far as the record shows. Her father, Daniel Weisman, was described in his counsel's brief as a "practicing Jew,"[178] and so, presumably, was Deborah, on whose behalf he was suing. There was no evidence in the record that the Weismans and Rabbi Gutterman belonged to different Jewish groups with mutually repugnant beliefs. Thus, while her and her father's separation-of-church-and-state scruples were undoubtedly disturbed by the rabbi's prayers, it is hard to see how listening to a rabbi of her own faith could "compromis[e her] religious scruples" or subject her to a "real conflict of conscience."[179]

(Scalia, J., dissenting), has much to recommend it, in contrast to Justice Kennedy's dilution of the concept.

177. *Weisman*, 112 S. Ct. at 2660.

178. Respondent's Brief in Opposition, *supra* note 29, at 5.

179. *Weisman*, 112 S. Ct. at 2660. The conflict of conscience was obviously real for both daughter and father at the graduation of Deborah Weisman's older sister Merith. There a minister asked those present to rise and give thanks to Jesus. *See* Schweitzer, *supra* note 1, at 129 n.22; *see also supra* note 30 and accompanying text.

Indeed, in the absence from the record of any complaints regarding Rabbi Gutterman's prayers on the part of members of any other faith or none, the fact that plaintiffs shared the rabbi's faith and apparently could not have been offended by the religious content of his message would appear to pose a serious problem of standing to sue for a violation of the Establishment Clause.[180] The Supreme Court found it unnecessary to consider Daniel Weisman's taxpayer standing[181] in light of the likelihood that an invocation and benediction would be conducted when Deborah later graduated from Classical High School in Providence, which the Court deemed to present "a live and justiciable controversy."[182]

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180. No question of standing could have arisen if Daniel Weisman had sued when his older daughter graduated from the same school in 1986. *See supra* note 179.

181. *Weisman*, 112 S. Ct. at 2654. The doctrine of taxpayer standing to sue in Establishment Clause cases is stated in Flast v. Cohen, 392 U.S. 83 (1968). In *Flast*, federal taxpayers sought to enjoin the expenditure of federal funds appropriated under the Elementary and Secondary Education Act of 1965 to finance instructional materials for parochial schools, claiming it violated the Establishment Clause. *Id.* at 85-86. The Court, noting its decision in Frothingham v. Mellon, 262 U.S. 447 (1923) (federal taxpayer lacked standing to challenge federal spending statute), created an exception to that rule and permitted taxpayer standing to attack a federal spending statute on Establishment Clause grounds if

> the taxpayer . . . establish[es] a logical link between [his or her] status [as taxpayer] and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution . . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed on the exercise of the congressional taxing and spending power . . . .

Id. at 102-03. Since the record does not disclose that the Providence public schools paid Rabbi Gutterman anything for delivering the invocation and benediction, government spending, a basic prerequisite for the exercise of taxpayer standing, was probably absent. And even if Rabbi Gutterman was paid a nominal sum, it is hard to imagine a more *de minimis* instance of a challenged government expenditure.

182. *Weisman*, 112 S. Ct. at 2654.

However, any grievance which might result from a plan by Classical High School to have a clergyman offer prayers at Deborah Weisman's expected June 1993 graduation was future, contingent, and speculative. The conclusion seems unavoidable that neither Deborah Weisman nor her father could show a palpable "injury in fact" that is a fundamental requirement for standing to sue.[183]

Thus, the posture of Daniel and Deborah Weisman was precisely the same as that of the plaintiffs who were denied standing in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*:[184]

> Although they claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by the plaintiffs *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.[185]

In the absence of taxpayer standing, and in the absence of "injury in fact" required for standing in general,[186] it seems plain that the Weismans lacked standing to sue.[187]

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183. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 473 (1982) ("[S]tanding . . . reflects a due regard for the autonomy of . . . persons . . . [and] is therefore restricted to litigants who can show 'injury in fact.'"); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) (plaintiff must demonstrate "that he personally has suffered some actual injury or threatened injury in order to acquire standing to sue"); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 41 (1976) (in order to satisfy standing requirement plaintiff must allege injury).

184. 454 U.S. 464 (1982).

185. *Id.* at 485-86.

186. *See* Association of Data Processing Orgs. v. Camp, 397 U.S. 150, 152 (1970) (to determine whether plaintiff has standing, court must first inquire

Similarly, the district court expressed the concern that "[s]choolchildren who are not members of the religions sponsored [by the graduation prayers], or children whose families are non-believers, may feel as though the school and government prefer beliefs other than their own."[188] This might well be true of children who are atheists, although the record discloses no atheist or other student objector besides Deborah Weisman. But with respect to Christian children, who no doubt comprised the majority in the Nathan Bishop Middle School, it is simply implausible in a predominantly Christian country, in which Jews are a minority of some two percent nationwide,[189] that Rabbi Gutterman's prayers could be understood as establishing Judaism as an official or preferred religion. Rather, the Court's fears in this regard seem like another of the "formulaic abstractions" which, according to Justice Scalia, "bedevil" our religion clause juris-

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whether plaintiff alleged "that the challenged action has caused him injury in fact"); *see also supra* note 183 and accompanying text.

187. Surprisingly, there is no indication in the record that the defendants ever challenged the Weismans' standing to sue, and this probably accounts for the fact that the issue was not even raised at the Supreme Court level. Another possible explanation is that the Court might have wanted to hear the case, and therefore relaxed the standing requirements in this instance. A third possible explanation is that the Court may regard the individual as irrelevant in constitutional cases. While the Weismans would surely have had standing to sue based on their older daughter's 1986 graduation, with its sectarian and proselytizing Christian benediction, *see supra* note 179, one might well ask why they should have been denied standing based on the 1989 graduation, since the constitutional issues were largely the same. Along these lines, the urgency of adjudicating Establishment Clause issues might be thought to justify the Court's hypothesizing "conflicts of conscience" and moral dilemmas which other members of the audience might have experienced upon hearing the prayers, *Weisman*, 112 S. Ct. at 2660, even though no such person felt sufficiently aggrieved to sue to bar the practice of graduation prayer. The contrast between such an approach and the court's stingy approach to standing requirements in other areas is manifest. *See infra* note 191.

188. *Weisman*, 728 F. Supp. 68, 73 (D.R.I. 1990).

189. According to the Bureau of the Census, U.S. Department of Commerce 1990 Census, out of a total U.S. population of 248,709,873, there are 5,981,000 members of the Jewish faith. THE WORLD ALMANAC 385, 718 (1993).

prudence.[190] No doubt sensitized by the genuinely agonizing situations faced by such plaintiffs as the Jehovah's Witnesses in *West Virginia Board of Education v. Barnette*, the Court has raised the rights of putative dissenters to be free of coercion or established orthodoxy to an abstract plane which requires no empirical evidence of a real threat. Presumed offense to hypothetical objectors suffices, and the factual circumstances of the actual plaintiff are largely irrelevant because of the overriding Establishment Clause principle.[191]

D. Has the Supreme Court Totally Outlawed Prayers at Public School Graduations?

Justice Kennedy's strenuous attempt to find "coercion" of Deborah Weisman (or other anonymous and nonprotesting students) in Rabbi Gutterman's prayers is ultimately unconvincing. If he was determined to find the graduation prayers unconstitutional, as he hinted at oral argument,[192] Justice Kennedy could have reached that result more plausibly by application of the much-maligned *Lemon* test. It could be argued persuasively that the primary effect of Rabbi Gutterman's prayers, although they were non-sectarian, was to advance religion vis-a-vis nonbelief, and that the actions of Principal Lee in selecting Rabbi Gutterman to give the prayers and furnishing him with guidelines for non-sec-

190. *Weisman*, 112 S. Ct. at 2685 (Scalia, J., dissenting).

191. This state of affairs is consistent with the Supreme Court's quite liberal doctrine of taxpayer standing to sue in Establishment Clause cases stated in *Flast v. Cohen*. *See supra* note 181 and accompanying text. *Flast* stands in marked contrast to the grudging concept of standing the Court has applied in other areas. *See, e.g.*, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (no taxpayer standing to challenge Internal Revenue Service ruling allegedly excessively favorable to hospitals which refused to serve indigents); Warth v. Seldin, 422 U.S. 490 (1975) (no standing of civil rights plaintiff to challenge zoning ordinance); United States v. Richardson, 418 U.S. 166 (1974) (no taxpayer standing to challenge statute freeing Central Intelligence Agency Director from requirement to account for public expenditures under U.S. CONST., art. I, § 9, cl. 7); Frothingham v. Mellon, 262 U.S. 447 (1923) (taxpayer lacked standing to challenge federal expenditures to states to reduce maternal and infant mortality).

192. *See supra* note 71 and accompanying text.

tarian prayers constituted excessive entanglement of the government with religion.[193] Why then did Justice Kennedy attempt to force the Rabbi's invocation and benediction into the Procrustean bed of a coercion test violation?

The answer appears to be that Justice Kennedy had an agenda transcending the mere task of deciding *Lee v. Weisman* correctly. According to Professor Jesse Choper, Justice Kennedy had three goals: to reject the *Lemon* three-pronged test, to have the Court adopt his coercion test, and to hold that the graduation prayers violated the Establishment Clause.[194] Although Justice Kennedy had four other votes for each of these propositions, they came from different coalitions of Justices. Accordingly, Justice Kennedy wrote a very narrow opinion indicating no need to reconsider *Lemon*.[195] But while the conservatives "lost the battle" in *Lee v. Weisman* by failing to uphold the prayer, they "won the war" because there are now five votes on the Court in favor of the coercion test.[196]

One major question remains: does *Lee v. Weisman* outlaw all graduation prayers, no matter what the circumstances, or are there ways to avoid the Establishment Clause proscription? Justice Scalia's dissent labeled *Weisman* "a jurisprudential disaster and not a practical one,"[197] because of his assumption that the Court will hold graduation prayers constitutional in the future

> so long as school authorities make clear that anyone who abstains from screaming in protest does not necessarily participate in the

193. Similarly, Justice Blackmun concluded that the local government's selection of Rabbi Gutterman to offer prayers at a public school event planned, supervised and given by school officials constituted advancement of religion in violation of the second prong of the *Lemon* test. *Weisman*, 112 S. Ct. at 2664 (Blackmun, J., concurring).

194. *Constitutional Law Conference*, 61 U.S.L.W. 2237, 2240 (Oct. 27, 1992). Justice Kennedy was formerly a law professor at McGeorge School of Law in Sacramento, and Jesse Choper is a professor of law at the University of California at Berkeley Boalt Hall School of Law. Professor Choper has stated his support for Justice Kennedy's coercion test in the past. *See Constitutional Law Conference*, 60 U.S.L.W. 2253, 2256-57 (Oct. 22, 1991).

195. *Weisman*, 112 S. Ct. at 2655.

196. *See supra* note 141 and accompanying text.

197. *Weisman*, 112 S. Ct. at 2685 (Scalia, J., dissenting).

> prayers. All that is seemingly needed is an announcement, or perhaps a written insertion at the beginning of the graduation Program, to the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so . . . .[198]

Given the extent of the disagreement between him and the majority in *Weisman*, one may question why Justice Scalia feels so confident that not all graduation prayers fall under *Weisman's* proscription. In any event, the Fifth Circuit has already posed the question. In *Jones v. Clear Creek Independent School District*,[199] the Fifth Circuit held that non-sectarian prayers by student volunteers at a public high school graduation satisfied all three prongs of the *Lemon* test and therefore did not violate the Establishment Clause.[200] The Supreme Court granted a petition for certiorari, vacated the judgment, and remanded the case for further consideration in light of *Lee v. Weisman*.[201] The Fifth Circuit subsequently reaffirmed its decision that the graduation prayers were constitutional, concluding that they satisfied not only the *Lemon* test, but also Justice O'Connor's endorsement test and *Lee v. Weisman's* coercion test.[202] Judge Reavley's veiled criticism of the Supreme Court's Establishment Clause jurisprudence,[203] and

198. *Id.* (Scalia, J., dissenting).

199. 930 F.2d 416 (5th Cir. 1991), *cert. granted and judgment vacated*, 112 S. Ct. 3020 (1992) (remanded for reconsideration in light of *Lee v. Weisman*), *aff'd on remand*, 977 F.2d 963 (5th Cir. 1992).

200. 930 F.2d at 423. The Clear Creek School District's Board of Trustees, shortly before trial, adopted a "Resolution" providing that whether to have invocations and benedictions "shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal," that such prayers, if any, were to "be given by a student volunteer," and that they "shall be nonsectarian and nonproselytizing in nature." *Id.* at 417. These guidelines were drafted by counsel to conform with Judge Merritt's opinion in Stein v. Plainwell Community Sch., 822 F.2d 1406, 1409-10 (6th Cir. 1987).

201. 930 F.2d 416 (5th Cir. 1991), *cert. granted and judgment vacated*, 112 S. Ct. 3020 (1992) (remanded for reconsideration in light of *Lee v. Weisman*), *aff'd on remand*, 977 F.2d 963 (5th Cir. 1992).

202. Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 972 (5th Cir. 1992).

203. *Id.* at 965-66.

his boldness in distinguishing *Lee v. Weisman* on the facts,[204] make this case a likely candidate for further Supreme Court review in which the Court might clarify the breadth of the *Weisman* holding.

In an article published before *Lee v. Weisman* was decided, I concluded that the record contained insufficient information about the graduation ceremony to answer definitively whether Rabbi Gutterman's invocation and benediction violated the Establishment Clause.[205] I argued, however, that carefully structured prayers at graduation ceremonies could pass constitutional muster.[206] The key is that the graduating students must initiate the request for prayers, in effect requesting that the school authorities make available a public forum during the ceremony for the desired prayers.[207] In order to avoid constitutional pitfalls, I concluded that teachers could not deliver the prayers, but that either students or outside clergymen were permissible; that the prayer-givers should be designated by a random process like drawing names from a hat; that all denominations represented locally

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204. *Id.* at 966-72.

205. *See* Schweitzer, *supra* note 1, at 181.

206. *Id.* at 183-85. For an argument that freedom of speech mandates requiring graduation prayers, see Phillip H. Harris, *Invocations, Benedictions and Freedom of Speech in Public Schools*, 68 EDUC. L. REP. 943 (Sept. 1991). Harris is Solicitor of the United States Catholic Conference, whose amicus curiae brief he authored in *Lee v. Weisman*.

207. This would appear to satisfy the standard set by Professor Walter Dellinger. He called the lower court decisions in *Weisman* "a straightforward application of settled First Amendment law on religion in public schools." Walter Dellinger, *supra* note 85, at C1. He further commented:

> The critical distinction in each case is between private speech and governmental speech. The cases do not preclude prayer or other religious activities in public schools if the decision to pray is a matter of wholly private choice; they do, however, preclude government officials from making the decision, as in *Weisman*, that there will be prayers.

Id. Thus, if a public school system did not propose, suggest or initiate plans for prayers at a graduation ceremony but merely responded to the desires of the graduating students by making available to them a couple of minutes of time during the ceremony for prayer by a student or other person chosen on a random basis, it would seem that Professor Dellinger would see in this no violation of the Establishment Clause.

should have access to the selection process; that prayer-givers should not proselytize or ask the audience to join with them in prayer or even to stand up or adopt any demeanor or posture of prayer; that the school authorities should not review the content of prayers either before or after they were delivered; and that it would be advisable for the school authorities to make an oral or written disclaimer stating plainly that the school was neutral and endorsed no religion.[208] As I read *Weisman*, the fatal flaw in the Nathan Bishop Middle School graduation ceremony, in the majority's view, was that the school officials decided that Rabbi Gutterman would pray and influenced the content of his prayers. I think it possible that the Court would consider it consistent with *Weisman* to permit graduation prayers under the carefully controlled circumstances described in the above guidelines.

CONCLUSION

It seems that *Lee v. Weisman* is not a final resting place but rather a way station in the long and tortuous history of Establishment Clause jurisprudence. Professors Choper and McConnell, and Justice Scalia may be right that the decision in effect spells the demise of the *Lemon v. Kurtzman* three-pronged test. For the time being, a narrow five Justice majority supports a coercion test for Establishment Clause violations. But Justice Kennedy's more separationist stance, Justice Souter's emergence as a staunch separationist, and the likelihood that President Clinton will have at least two appointments to make to the Supreme Court during his term in office, who would be likely to

208. Schweitzer, *supra* note 1, at 183-85. *See also* Gregory M. McAndrew, *Invocations at Graduation*, 101 YALE L. REV. 663, 677-82 (1991) (arguing, on the basis of Board of Educ. v. Mergens, 496 U.S. 276 (1990), that an equal access plan for student invocations, both religious and non-religious, at public school graduations is constitutional if schools create an open public forum with same safeguards against official endorsement of religion and official interference as were present in *Mergens*).

be separationists, all make it unlikely that the 1990s will see a major upheaval in Establishment Clause jurisprudence.[209]

209. Further developments in the Court's Establishment Clause doctrine are however possible in two other cases in which the Court granted certiorari this Term: Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 770 F. Supp. 91 (E.D.N.Y. 1991), *aff'd*, 959 F.2d 381 (2d Cir.), *cert. granted*, 113 S. Ct. 51 (1992) and Zobrest v. Catalina Foothills Sch. Dist., 963 F.2d 1190 (9th Cir.), *cert. granted*, 113 S. Ct. 52 (1992). Plaintiff church and pastor in *Lamb's Chapel* unsuccessfully challenged in the lower courts a local school district rule and a New York statute, N.Y. EDUC. LAW § 414 (McKinney 1988 & Supp. 1992), barring use of school buildings for meetings of religious groups; the plaintiffs wanted to show religious films during nonschool hours. *Lamb's Chapel*, 770 F. Supp. at 92. The plaintiff in *Zobrest*, a deaf student at a Catholic high school, unsuccessfully appealed the denial of funds to pay for a sign language interpreter for his benefit in class, although he concededly would have received such funds under the Federal Education of the Handicapped Act, Individuals with Disabilities Education Act, § 613(a)(4)(A), *as amended*, 20 U.S.C. § 1413 (a)(4)(A) (1988 & Supp. 1992), and Arizona law, ARIZ. REV. STAT. ANN. § § 15-761 to 15-772 (1988 & Supp. 1992), if he attended public school. *Zobrest*, 963 F.2d at 1191.